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SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM 1972

No. ~~72-213~~ 72-213

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE AND ITS MEMBER LINES,
Petitioners,

vs.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petitioners,

vs.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petitioners, the Latin America/Pacific Coast Steamship Conference and its member steamship lines, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on May 10, 1972.

OPINIONS BELOW

The Report of the respondent Federal Maritime Commission, from which this appeal arose, issued December 31, 1970, is not yet officially reported; it is contained in the Pike and Fischer loose-leaf service entitled "Shipping Regulation Reports" at 12 S.R.R. 63, and is reproduced as

Appendix B to this petition; it is also contained in a separate Joint Appendix prepared for use in the Court below and being filed herein as a part of the record in that Court (beginning at J.A. 161). The said Joint Appendix also includes earlier unreported orders, Examiner's decisions and other selected materials in the case, at the administrative-agency level. Earlier reported final Commission decisions, in this same F.M.C. Docket 1092, not reproduced in the Joint Appendix, appear in the published Federal Maritime Commission Reports, as follows:

1964 Decision:
The Dual Rate Cases, 8 F.M.C. 16, at 49-51 (1964).

1969 Decision:
Agreement No. 8660-Latin America/Pacific Coast Steamship Conference, 12 F.M.C. 149 (1969).

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit, which affirmed the Commission's latest Report and Order, is not yet reported; it is reproduced in Appendix A to the instant petition.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered May 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350.

QUESTIONS PRESENTED

1. Has the Federal Maritime Commission been delegated authority, by statute or otherwise, to grant or withhold, in its sole discretion, exemption from the United States antitrust laws?

2. May the Federal Maritime Commission disapprove (or, order to be critically "amended") a contract system previously approved by it pursuant to and in accordance with Section 14b of the Shipping Act (46 U.S.C. § 813a),

without any supportive evidence or factual basis, and indeed in the face of uncontradicted, unanimous and widespread industry support, simply and solely on the basis of a supposed "antitrust presumption" against approvability?

STATUTORY PROVISIONS INVOLVED

The statutory provision directly involved is Section 14b of the Shipping Act, 1916, 46 U.S.C. § 813a, added to the Act in 1961. Also involved, more indirectly, are Section 15 of the Shipping Act, 46 U.S.C. § 814, and the Administrative Procedure Act, particularly Section 7 thereof, 5 U.S.C. § 556. All are reproduced in Appendix D to this petition.

STATEMENT OF THE CASE

The decision of the Federal Maritime Commission, now affirmed by the Court of Appeals, is but the most recent in a long series of Commission decisions in this same agency Docket 1092, concerning the petitioner Conference and its exclusive patronage, or, "dual rate", contract system, spanning nearly a decade.

Petitioners are the members of a steamship conference (and the Conference itself) serving the trade between the Pacific Coast of the United States and a number of Caribbean, Central and South American countries. The Conference embraces both Southbound and Northbound routes. Shortly after the enactment of Section 14b of the Shipping Act, in 1961, the lines adopted and submitted to the Commission, as required by that statutory provision, a form of exclusive patronage contract for the use of Pacific Coast shippers, in the Southbound routes, and a separate but identical form of contract for Pacific Coast consignees, in the Northbound routes. In February of 1966, after a first appeal (largely on other grounds), the Commission approved both form and substance of petitioners' two-part

contract system, after determining that it complied with all of the requirements of Section 14b. Thereafter, however, the Commission reopened the Docket and reversed its earlier unqualified approval, in practical effect subdividing the Conference into five separate conferences. It ordered that, as a condition for the continued "use" of the contract system, the Conference must offer five separate contract systems, three Southbound and two Northbound, in place of the one in each direction previously submitted and approved.

The Commission's order followed a hearing at which, without dissenting voice, a host of witnesses testified that the present system was necessary and vital to the preservation of stable trading conditions in these important foreign trades of the United States. The Commission's proposed "five-contract" substitute was unanimously rejected. No witness appeared, no evidence was offered, either against the present system or for the agency's proposed alternative. Nevertheless, a bare three-man majority of the Commission rejected all of the evidence, as having failed to "convince" it.

Section 14b exempts all approved contract rates systems from the antitrust laws. Yet the Commission here partitioned petitioners' admittedly valid pre-existing two-part contract system into five separate sub-systems, saying, as its ultimate justification for so doing,

> ". . . we will not sanction the present system's unwarranted inroads upon the nation's antitrust laws." (Appendix B, p. 58).

Section 14b delegated to the Commission the authority to disapprove (or refuse to approve) any particular form of contract system upon finding, after notice and hearing, that the system would operate unjustly, unfairly, or "contrary to the public interest." In the present case the Com-

mission determined, initially, that petitioners' contract system would not operate in any of these proscribed fashions, and approved it. Then however the Commission turned its back on Section 14b, and enforced the Sherman Act against petitioners' right to "use" that system effectively—as noted, totally without evidentiary basis or support. The broad new powers thus invoked over Section 14b contracts were claimed to stem from this Court's decision in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968).

The Court of Appeals, whose twice-voiced firm opinion in the *Svenska* proceedings had been rebuked and summarily reversed by this Court's *Svenska* decision,[1] refused to distinguish either the facts or the statutory provisions involved, and—notwithstanding its "candid admission" of "difficulty" and "doubt" in reading either statute (Section 14b) or its clear legislative history so as to reach the Commission's result (Appendix A to this petition, pp. 18, 22, 23)—in the final analysis felt compelled to do so, under compulsion of *Svenska*. It thus held that, regardless of what the statutes said, *Svenska* had placed the burden of proof and persuasion (*not* merely a burden of "coming forward and explaining"; see 390 U.S. at 246) squarely on the respondent Conference's shoulders.

This step taken, and being bound by customary limitations on review of an agency's factual determinations, the Court thereafter had little difficulty in sustaining the Commission's dogged refusal to "be convinced."

On application made by the petitioner Conference following issuance of the 1970 order, the Commission stayed the effective date of its command, first for a sixty-day period,

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1. *Aktiebolaget Svenska Amerika Linien v. Federal Maritime Commission*, 125 App.D.C. 359, 372 F.2d 932 (D.C. Cir. 1967); 122 App.D.C. 59, 351 F.2d 756 (D.C. Cir. 1965).

and thereafter for the duration of this appeal [see J.A. 202]. Thus the status quo which has existed—without complaint—since February of 1966, remains in effect at this point.

The questions presented by this petition do not require a more detailed statement of the case at this point. The record of this nine-year proceeding is complex and voluminous, but largely irrelevant to the present stage of the dispute. To avoid overburdening this petition, but for the Court's fuller information, we have set forth a narrative summary of the whole proceedings, in Appendix C.

REASONS FOR GRANTING THE WRIT

This case presents issues fundamental to the federal regulatory process which have, it is submitted, been decided by the respondent agency and the Court below in such fashion as to subvert entirely the clearly expressed will of Congress, and to open up an era of uncontrolled and literally unreviewable agency exercise of power.

Though of direct and primary effect on the administration of the Shipping Act of 1916 (which is of course the statute actually involved), the decision also has, of necessity, an unavoidable critical impact on the entire fabric of the administrative process, as set forth in the Administrative Procedure Act, both at the agency level and on judicial review. In the final analysis, what is at stake is whether an unmistakably clear Congressional mandate shall be respected, or utterly disregarded.

1. The Problem from a Wider View.

At the bedrock of the case is the fundamental question of the carrying out of legislative policy. The Federal Maritime Commission was created for one purpose only, namely, to administer the Shipping Act. It was directed to do nothing else. The Commission was judicially endowed with "expertise" in shipping problems in international commerce.

By statute it was delegated the task of implementing a legislative determination that the U.S. antitrust laws and policies are unworkable in the field of international transportation. In 1916 and again 1961 Congress expressed its firm conviction in this determination, following the overwhelming evidence and testimony put before it. The enactment of Section 15 in 1916, and even more pointedly the enactment of Section 14b in 1961, constitute a clear, informed and deliberate legislative choice *against* the injection of antitrust concepts into this field of domestically-regulated international transportation, a legislative mandate that is no less important, no less dignified, and no less the national policy than are the antitrust laws themselves, in other, purely domestic areas of U.S. industry and commerce.

Some measure of this statutory exemption from antitrust policy and restrictions has, subsequent to the enactment of the Shipping Act, been followed by similar exemptions in the other two U.S. regulatory transportation statutes, the Federal Aviation Act (49 U.S.C. §§ 1382, 1384) and, to a somewhat lesser extent, the Interstate Commerce Act (49 U.S.C. § 5a). In the field of transportation, concerted ratemaking and related activity, under regulatory supervision, is as much a part of U.S. policy as is unfettered free competition in other areas, it having been proved to the satisfaction of Congress that, in the transportation field, the public interest lies squarely in the establishment of uniform rates and treatment for all users, by all competing carrier-suppliers. While this policy runs through all three transporation statutes, nowhere is it more affirmatively stated, nor more essential, than in the area of waterborne foreign commerce, where entry of competitors is unlimited and unrestrictable, under the historic doctrine of the "freedom of the seas."

In its now-celebrated decision in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968) (*"Svenska"*), this Court declared that the antitrust policy of the Sherman Act, et al., was a more profound national policy than the express statutory exemption from the Sherman Act, et al., in Section 15 of the Shipping Act. The Federal Maritime Commission was directed to "accommodate" these two, opposing policies in its administration of Section 15. In the present case, the Commission "accommodated" the conflict by embracing the one and ignoring the other, assuming to itself the purely legislative role of determining whether or not the antitrust laws should be applied in the field of international commerce. Here the Commission held that they should. In another case also currently before this Court, *Federal Maritime Commission v. Seatrain Lines, Inc.,* (Docket 71-1647), the Commission believes that they should not; and is urging this Court to give it the power of "granting [or, obviously, withholding] immunity from the antitrust laws" for merger agreements among steamship lines, at least—for the present—American steamship lines.

The situation literally cries for resolution by this Court. As a practical matter (and international shipping is a practical business), it is not possible long to survive under a regulatory climate which straddles, uncertainly and unpredictably, two conflicting national policies, one that encourages collectivity and one that prohibits it—all, insofar as can be objectively ascertained, in the sole and standardless discretion of one small administrative agency. Industry can not function from day to day, nor certainly plan for the future, under a system which can not tell it whether its actions will be governed by the Sherman and Clayton Acts, which the Commission should not administer but does, or by the Shipping Act, which the Commission should administer but more and more frequently does not.

This is the greater principle involved and the conceptual framework which permitted the instant case to arise. Although that principle had its genesis in this Court's *Svenska,* what happened in this case, and the issues here involved, far exceed anything yet considered by this Court.

2. The Critical Importance of the Case in the Administration of the Shipping Act.

Notwithstanding its factual beginnings of nearly a decade ago, as this case now comes to this Court it represents the Federal Maritime Commission's first wholesale application of the so-called "antitrust-presumption" principle of this Court's *Svenska* decision. In the present decision, the Commission has claimed, under ostensible authority of *Svenska,* the right to order disapproved (or, which is the same thing, critically "modified") a shipping conference's pre-existing, previously-approved exclusive patronage contract system (under Section 14b of the statute), without any evidence (on the record or otherwise) of harm or even discontent resulting from the existing arrangement; without protest, or even request, from any segment of the shipping public; and, indeed, in the face of an unprecedented unanimity of view, from all such segments of the industry, in favor of the existing system and affirmatively opposed to the Commission's self-devised, proffered (and, as it was to turn out, predetermined) "modification." The solitary basis for the Commission's order—there being no evidence to support it—was its 1964 "position" as to what was "necessary and fair" (subsequently reversed by the Ninth Circuit), up-dated with a "failure to be convinced" by all the evidence which was thereafter adduced.

There are critical differences between the *Svenska* case and the case at hand, which make the Commission's (and lower Court's) easy and uncritical extension of the one to the other not only erroneous as a matter of both fact and

law, but of vastly far-sweeping consequences. Unlike *Svenska,* there was here no ususual nor unusually anticompetitive scheme, at the outer extremities of that "myriad of restrictive agreements in the maritime industry" which are encompassed under the broad umbrella of Section 15 of the Act, and to which this Court spoke in *Volkswagenwerk v. Federal Maritime Commission,* 390 U.S. 261, 276 (1968).

To the contrary, what was involved here was the very essential sort of statutory device—no more, no less, no different—that Congress in 1961 expressly focused its attention upon, and expressly legalized with an affirmative presumption of approvability.

Factually as well as statutorily the two cases were sharply distinguishable. In *Svenska,* the challenged practices were alleged to operate, in fact, to the direct and demonstrable injury of a specific segment of the shipping industry; evidence of such harm was adduced in the record; and the agency made factual findings, based on that evidence (as well as logical inferences, *from,* however, *demonstrable evidence*), in support of its disapproval order. This Court's affirmance of the Commission's result in *Svenska* did not stop with the bare announcement of an "antitrust presumption," but went on for many pages to examine the record evidence in support of that agency determination. None of that factual basis was present here; nor, if this decision is allowed to stand, will it ever be required of the agency again.

The expansive implications of this case thus run far beyond its own limited facts. Under the Commission's rationale, now affirmed by the Court of Appeals, there is absolutely nothing to prevent the Commission from moving, in wholesale, unchecked and uncheckable fashion, to fragment into unworkable little pieces the contract systems of every other conference serving the United States—many of

which are considerably larger, in terms both of volume of tonnage and scope and disparateness of territory, than that of the petitioner conference (see, e.g., Commissioner Day's dissent; Appendix B, p. 72). There is, by the same precedent, equal clear invitation to the Commission quite literally to take apart the conferences themselves (under Section 15), whenever it in its exclusive wisdom feels it "necessary and fair" to do so and/or deems the antitrust exemption "unsanctionable."

This case is clear license and absolute authority for nothing less. Both Sections, Commission and now Court have ruled, are absolute fungibles, insofar as the *Svenska* concept is concerned.[2] If no factual underpinning for Commission ukase was required here (as has been the result to this point), none will be required elsewhere. For it must be recalled that (1) no industry protest, no allegation of injury prompted this order; moreover, (2) from and after February 16, 1966, when the Commission *granted unconditional approval* to the petitioners' present contract system, *the conference has sought nothing at all.* Everything since that date has been conducted *solely on the Commission's own initiative.* If therefore the Commission can set aside a previous approval here, on nothing more than an undefined and non-statutory sense of the "necessary and fair," and on some unrebuttable-in-fact "antitrust presumption", it can do so with equal ease, industry-wide. There is nothing in the statute, or anywhere else, that acts to circumscribe the Commission's refusal to "be convinced."

The basic unfairness of such an unfettered regulatory scheme of things, as an abstract matter, is compounded when one recognizes the impossibility of the assigned task. A decade ago, when Section 14b was in the process of being enacted, the Commission's immediate predecessor (Federal

2. See the next section of this Argument for a discussion of the propriety of this easy assimilation. And see Commissioner Day's dissent, taking issue with that uncritical assimilation of the two provisions; Appendix B, p. 60, n. 4.

Maritime Board) acknowledged some measure of the inherent difficulty in the internationally operative shipping field, in *recommending that the affirmative-presumption approach be adopted.* It stated to the House Committee:

> "[*W*]*e recommend that the words 'that it affirmatively finds to be in the public interest' be stricken.* In conformity with other similar statutes, such as the Aviation Act of 1958, *we believe that, if a public interest standard is to be applied by the Board, it should be phrased in terms of permitting the approval of agreements which the Board does not find to be adverse to the public interest.* See 49 U.S.C. 1382(b). *Requiring a positive finding in favor of the public interest would prevent carriers from operating under arrangements which, although not meriting disapproval under the standards of the statute, could not be shown to positively contribute to the public interest.*" House Report No. 498, 87th Cong., 1st. Sess., 18 (1961) (emphasis supplied)

As noted hereafter, it was this recommendation, and the supportive reasons therefor, which were, in the final version of Section 14b, precisely the view which prevailed.

Yet in the instant case, exactly the opposite took place. Unless reviewed by this Court, it will stand as the irreversible turning-point in the history of the Shipping Act.

3. The Importance of the Case to the Principle of Adherence to the Clear Expression of the Congressional Will, and Its Impact on the Administrative Process Generally.

(a) SECTION 14b OF THE SHIPPING ACT.

In *Svenska* this Court upheld the respondent Commission's divination of an "antitrust standard" in the administration of Section 15 of the Shipping Act. In so doing, this Court interpreted into Section 15 a *generalized, judicially-inferred* presumption of Congressional intent, that—at least "in some ways" (390 U.S. at 244)—agreements within

the scope of that Section could, *prima facie,* by their very "anti-competitive" nature, be considered "contrary to the public interest."

However proper that judicial inference with respect to Section 15—or, what is more probably correct, to the substantially unusual, "outer-extremity" sorts of Section 15 arrangements there involved—the rationale simply can not in any proper sense of legislative interpretation apply to the very basic sort of Section 14b arrangement involved here. Not only the clear language of the statute but, even more compellingly, the unequivocal, lengthy legislative history on *this precise, focused issue,* show beyond legitimate question that *Congress itself* considered—*and itself rejected—precisely the type of "antitrust presumption" against approvability* which has been unabashedly applied, and "not without difficulty" sustained, here.

The careful attention to antitrust principles given by both Houses of Congress, in the adoption of P.L. 87-346, is illustrated by the following, by no means exhaustive, series of passages. The quotations are also instructive on the question of who was intended, by Congress, to shoulder the burden of proof respecting "the public interest," pro or con:

From the House Report of June 8, 1961:

> "The Department of Justice testimony on the legislation was generally unfavorable. While its position is consistent with the antitrust policy of the United States, it fails to take into account the peculiar nature of the particular business involved.
>
> • • •
>
> "Throughout the course of the hearings, the committee has been confronted with the problem of endeavoring to reconcile the conflict between our traditional antitrust concepts and the needs of our foreign waterborne commerce.
>
> • • •
>
> "The hearings of the committee have made it quite clear that our traditional antitrust concepts cannot be

fully applied to this aspect of international commerce. Your committee has concluded that any attempt to effect regulation of this commerce in a measure comparable to that applied to our domestic commerce would be highly detrimental to our essential American-flag merchant marine." House Report No. 498, 87th Cong., 1st Sess., 12, 13 (1961).

From the Senate Report, of August 31, 1961:

"In two respects that bill as it passed the House constitutes a landmark of sensible international shipping regulatory legislation. First, it accords great weight to the rights and needs of American shippers. Second, it forthrightly rejects the domestic antitrust argument that fair and effective exclusive patronage contracts between shippers and steamship conferences should not be legalized.

"Thoughtful comparison of purposes of the House bill with those of your committee's amendments will reveal an immense number of similarities and a few important differences." Senate Report No. 860, 87th Cong., 1st Sess., 1 (1961).

Further from the Senate Report, in outlining its basic change, in the proposed legislation, from the "affirmative-showing" requirement of the House version (as we have seen, a change urged by, among others, the Federal Maritime Board):

"Section 2.

"This section would amend the Shipping Act, 1916, by adding a new section that would require the Federal Maritime Commission, notwithstanding any other provision of the Shipping Act, on application and after notice, to permit any common carrier by water in foreign commerce, or conference of such carriers, to enter into certain types of dual rate contracts with shippers or consignees." Senate Report No. 860, 87th Cong., 1st Sess., 12 (1961).

More specifically (as Point 2 of the Senate Committee's "Major Amendments")—and peculiarly apropos to the burden imposed on the petitioner Conference by the Commission in this case—

> "2. *In view of the eight specific safeguards which must be in dual-rate contracts before the Commission may approve them, must the Commission also be required to make findings, based on substantial evidence, that the contracts are not (1) detrimental to the commerce of the United States, or (2) contrary to the public interest, or (3) unjustly discriminatory or exporters from the United States and their foreign competitors?*
>
> "In addition to eight specific safeguards which must be in each dual-rate contract, the bill as it passed the House would require the Commission to find that the contract was (1) not intended to or reasonably likely to cause the exclusion of any other carrier from the trade, (2) not detrimental to the commerce of the United States, and (3) not contrary to the public interest.
>
> "*Your committee concluded that in order for the Commission to make these additional findings, the parties applying for permission to use dual-rate contracts would have to build extensive records before the Commission, even though there might be no opposition to the contracts,* and even though they might clearly contain the eight matters expressly required by statute.
>
> "Your committee believes that if the eight specific requirements set forth in its amendments are met by the proposed contract, it *should be entitled to Commission approval unless the Commission finds* that the contract would be detrimental to the commerce of the United States, or contrary to the public interest, or unjustly discriminatory or unfair. *We believe that any contract which contains the eight safeguards expressly required by the amended bill makes out a prima facie case that the contract is not detrimental to our commerce, or contrary to our public interest, or unjustly*

discriminatory or unfair." Senate Report No. 810, *supra,* at 23. (emphasis in all but opening paragraph supplied).[3]

Finally, from the Report of the House-Senate Conference which compromised the differences between the House and senate bills (House Report No. 1247), and adopted as the final legislation the Senate approach (also, of course, the approach of the Federal Maritime Board—but not of the present Commission):

> "Basically, the difference between H.R. 6775, as it passed the House and passed the Senate is in the manner of approach in four major respects.
>
> "(1) The House bill declared exclusive patronage shipping contracts between carriers and shippers to be prohibited except upon prior approval by the appropriate Federal Government agency (now Federal Maritime Commission) and required that the use of such contracts by steamship conferences or individual steamship companies could be approved only if they met certain specified criterial and standards. *The bill as it passed the Senate eliminated the prohibition language and affirmatively permitted the use of dual rate, or exclusive patronage, contracts.*

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3. It is true, as the Court below noted, that the "eighth specific requirement" was what is now subsection 14b(9) of the section, which stipulates that the contract should "contain such other provisions, not inconsistent herewith as the Commission shall require or permit." It is sophistry, however, to postulate this as the basis for the Commission's "five-contract" ruling in this case. First, in this case, it is clear from the Commission's own words that it *was not* acting under this provision, but was, rather, acting under the so-called "general standards—viz, "detrimental to the commerce of the United States [or] contrary to the public interest."

Perhaps more compellingly, it must be noted that *the same* appellate Court and case which coined the "all-important proviso phrase for § 14b(9) (the Ninth Circuit, in *Pacific Coast European Conference v. Federal Maritime Commission,* 350 F.2d 197 (1965) *was the very Court and case* which *overturned the Commission,* the first time around, on precisely this "five-contract" "modification." See the opinion below, Appendix A hereto, p.4; see also Appendix C, p.81, n. 7.

"(2) The bill as it passed the House made it mandatory that all criteria be affirmatively met before the use of exclusive patronage contracts would be permitted and conference agreements approved by the Commission. *The Senate version would permit the use of exclusive patronage contracts unless the Commission made findings to the contrary.*

"(3) ....

"(4) . . . .

"As agreed upon, by the conferees, the bill in major respects conforms with the Senate approach on the foregoing points.

"Discussion of the differences in more detail follows. "*The House bill required findings by the Commission that a proposal dual-rate conference agreement would not be detrimental to the commerce of the United States or contrary to the public interest* and is not intended, and will not be reasonably likely, to cause the exclusion of any other carriers from the trade. *The Senate version* omitted the last provision and, with respect to the others, *provided that a dual-rate agreement should be approved unless the Commission found it to be detrimental to the commerce of the United States or contrary to the public interest. The conferees' agreement adopts the Senate amendments.*" Cong. Record, Sept. 20, 1961, pp. 19290-19291; Sept. 23, 1961, pp. 19861-19862 (emphasis supplied).

What Congress actually said, and did, could not be clearer. In the face of it all, it is scant wonder that the Court of Appeals felt compelled to the "candid admission" that its "statutory exegesis" reaching the antipodal result was achieved "not without difficulty."[4]

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4. In light of this crystal-clear *and express* Congressional mandate, the Appellate Court's five pages of learned treatise on the "accommodation of regulatory and antitrust policies" and "implied exemptions" (Appendix A, pp. 6-11), however scholarly, simply have nothing to do with the case at hand.

(b) SECTION 7 OF THE ADMINISTRATIVE PROCEDURE ACT.

Congress has spoken equally plainly in the Administrative Procedure Act, in requiring that—

> "Except as otherwise provided by statute,[5] the proponent of a rule or order has the burden of proof";

also, that no "sanction may be imposed [n]or rule or order issued except" insofar as is "supported by and in accordance with the reliable, probative and substantial evidence." Section 7, 5 U.S.C. § 556.

Here, undeniably and indeed self-concededly, the respondent Commission, as the "proponent of the rule or order" (or, here, both-in-one) which had as its purpose the radical upsetting of the pre-existing, happy status quo, was the party required to bear the burden of proof. The Commission admitted this (12 F.M.C. at 154, n.8)—although immediately thereafter holding it automatically and instantly satisfied, through some sort of *scintilla juris* alchemy, by (supposed) operation of *Svenska*. The Court of Appeals did not even bother with the intermediate step, but instead simply by-passed the A.P.A., declaring bluntly that *Svenska* cast the burden of proof and persuasion squarely upon the respondents.

The Commission had of course *no* evidence—"reliable, probative, substantial," or otherwise—to support its imposition of its rule/order upon the respondents.

No one would take particular issue with the more circumspect industry burden which *Svenska* articulated, that of *going forward*—in the words of the *Svenska* decision itself, a requirement—

> "that a conference adopting[6] a particular rule . . .

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5. *Not*, note, "by judicial presumption."

6. Note again, however, that in neither of the later two proceedings before the Commission was the Conference seeking to "adopt" anything new. By the time of the final decision here on review, its contract system had been in unimpaired, lawful effect for nearly five full years.

> must *come forward and explain* to the Commission what [its] reasons are";

that it must put—

> "other evidence in[to] the record which *fairly detracts from* the weight of [any] antitrust violation." 390 U.S. at 246 (emphasis and footnotes supplied).[7]

The Conference here assuredly met these lesser burdens —but under the broad sweep of the Commission's chosen reading of *Svenska,* this was not enough. Rather, Commission and now Court have placed full-blown upon the shoulders of industry an affirmative burden of absolute proof and persuasion—not merely when seeking to extend their concerted activities, nor yet when defending them against charges of tangible injury caused (the actual *Svenska* case), but rather, *simply to keep what they already lawfully have!*

Yet the relevant statutes, Shipping Act and A.P.A., clearly and unequivocally command just the reverse!

There is no rational way this topsy-turvy, "black-means-white" sort of statutory misreading can be contained to one small area of the federal administrative process. If the Administrative Procedure Act is allowed to be scuttled here, it will soon fall elsewhere, with increasingly greater ease.

There is, as well, no rational way to reconcile the lower tribunals' actions in this case with this Court's own insistence upon proper and careful adherence to the expressions of the Congressional will, typified in decision after decision in the Term just concluded. For example, in *Flood v. Kuhn,* ..... U.S. ....., 40 L.W. 4747 (June 10, 1972), a majority

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7. Note that, by operation of the previous approval, there was no "violation," of the antitrust laws, Shipping Act, or anything else, actually involved here.

of this Court, in full and frank recognition of the anomaly thus being perpetuated, adhered to baseball's exemption from the antitrust laws, *not* because of any particular belief in the enduring correctness of *Federal Baseball*[8] and *Toolson*,[9] but rather (clearly so, for at least three Justices), solely on the basis that—

> "Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has *clearly evinced a desire* not to disapprove them legislatively." 40 L.W. at 4754 (emphasis supplied).[10]

Again, in *Gelbard v. United States*, ... U.S. ....., 40 L.W. 4862 (June 26, 1972), and *Pipefitters Local Union No. 562 v. United States*, ... U.S. ....., 40 L.W. 4786 (June 22, 1972), both majority and dissenting opinions insisted upon close, careful and thorough examination of the Congressional will, as disclosed both in the precise language of the particular statutes involved and in their lengthy legislative histories. Respect for the "fundamental policy adopted by Congress," which underlies the rationale both of decisions and of dissents in those cases, cannot be reconciled with the complete and cavalier disregard for that co-equal branch of government inherent in the results heretofore reached in the present case.

CONCLUSION

The focused issue here is this Court's 1968 *Svenska* decision. We do not believe, notwithstanding the broad sweep of certain of its language, that it was meant to produce the excesses reached here—a rude trampling under foot of

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8. *Federal Baseball v. National League*, 259 U.S. 200 (1922).

9. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

10. The Chief Justice in a concurring opinion, though doubting that "congressional inaction is . . . a solid base," nevertheless considered "the least undesirable course" to be "to let the matter rest with Congress . . ." 40 L.W. at 4953.

all canons of statutory construction, and a literal turning inside out of both Shipping Act specifically and the Administrative Procedure Act and the administrative process generally. If we are wrong and Commission and Court below were correct, *Svenska* should be reexamined, and sooner rather than later. If however, we are correct, review by this Court now is essential, to reestablish while there is time the principle of an ordered and orderly regulatory scheme, faithful to the legislative mandate and subject to a meaningful judicial review.

For the reasons herein stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GRAHAM & JAMES
LEONARD G. JAMES
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Attorneys for Petitioners

Dated: August 4, 1972

(Appendices Follow)

Appendix A

United States Court of Appeals
for the District of Columbia Circuit

No. 71-1107

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE AND ITS MEMBER LINES, PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the Federal Maritime Commission

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Decided May 10, 1972

[Judgment entered this date]

Mr. F. Conger Fawcett, with whom *Mr. John P. Meade* was on the brief, for petitioners.

Mr. John R. Ewers, Attorney, Federal Maritime Commission, for respondents. *Messrs. James L. Pimper,* General Counsel, Federal Maritime Commission, *Edward G. Gruis,* Deputy General Counsel, *Paul J. Fitzpatrick,* Attorney, Federal Maritime Commission, and *Irwin A. Seibel,* Attorney, Department of Justice, were on the brief for respondents.

Before TAMM and WILKEY, *Circuit Judges,* and MATTHEWS,* U.S. Senior District Judge for the District of Columbia.

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*Sitting by designation pursuant to 28 U.S.C. § 294(c) (1970).

TAMM, *Circuit Judge*: After nearly a decade of litigation we are called upon to examine the ramifications of the Supreme Court's decision in *Federal Maritime Comm. v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968), and decide whether the Federal Maritime Commission's instant order is in accordance with relevant law and supported by substantial evidence. Answering these questions in the affirmative, we affirm the order under review.

This is a petition for review of an order of the Commission amending a dual rate contract system to permit ocean shippers and receivers to separately contract for the carriage of goods under preferential rates in each of five trade areas served by petitioner, the Latin America/Pacific Coast Steamship Conference. Petitioners' existing exclusive patronage dual rate contract requires shippers, in order to obtain lower rates, to give their exclusive patronage to petitioners in all three outbound trades served by petitioners, and similarly requires receivers, in order to obtain lower rates, to do likewise with reference to petitioners' two inbound trades.

I. *History of Proceedings*

A. *Phase One*

The long procedural tangle in the instant case had its beginning in January of 1962 when petitioner, pursuant to section 15 of the Shipping Act[1] (hereinafter the "Act"), filed for approval of Agreement No. 8660 which created the Latin America/Pacific Coast Steamship Conference, superseding ten previously independent conferences serving inbound and outbound trade between the Pacific Coast of the United States and Latin America. Dividing the

1. 46 U.S.C. § 814 (1970) reprinted in Appendix.

trade into five areas, the agreement provided that, although all members of the conference had a vote with reference to general matters, only those carriers actively serving a particular trade area could participate in the establishment of rates and related matters affecting that area. While the Commission was considering Agreement No. 8660, petitioners filed proposed dual rate contracts[2] for Commission approval under section 14b of the Act.[3] Under these contracts, shippers of goods in any of the outbound trade areas were committed to exclusive use of conference vessels in all three outbound trade areas, while receivers were obligated to exclusive use of conference vessels in both inbound trade areas.

After consideration of the record, the Commission rendered its decision in *The Dual Rate Cases,* 8 F.M.C. 16 (1964), which approved petitioners' Agreement No. 8660 and the dual rate contracts *subject* to the condition that petitioners offer their dual rate contracts to merchants on a *separate* basis in *each* of the five trade areas. The Commission expressed its concern stating that

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2. Senator Kefauver offered the following definition in the Senate debates:

> What is a dual-rate contract? Essentially, it is an exclusive patronage contract whereby a shipper—or consignee—promises to transport all of the cargo under his control, between ports within the scope of a steamship conference agreement, aboard vessels belonging to that conference. Shippers who do not sign such an agreement are assessed a rate, called the non-contract rate, substantially above the so-called contract rate which is available to signatories. In its most elemental terms, the dual-rate contract is nothing but an exclusive dealing arrangement in which signatory shippers are given preferential treatment while those unwilling to be bound are penalized by higher rates.

Index to Legislative History of Steamship Conference Dual Rate Law, S. Doc. No. 100, 87th Cong., 1st Sess. 292 (1962).

3. 46 U.S.C. § 813a (1970) reprinted in Appendix.

> if the conference is permitted to offer a single dual rate contract which includes all five of the trade areas, merchants will be forced to obligate themselves to exclusive conference patronage in trade areas not desired in order to obtain contract rates in a trade area where they feel the dual rate contract meets their needs. This seems to us neither necessary nor fair.

Id. at 50.

Petitioners and two other conferences filed petitions for review of the Commission's decision in the Ninth Circuit, which, although remanding for certain procedural infirmities, affirmed the Commission with respect to its section 14b actions. *Pacific Coast European Conference v. United States,* 350 F.2d 197 (9th Cir.), *cert. denied,* 382 U.S. 958 (1965). On petition for rehearing, however, the Ninth Circuit, in an unpublished *per curiam* opinion, set aside the five-contract separability condition imposed by the Commission.

B. *Phase Two*

Following remand, the Commission instituted a rule making proceeding to determine whether the "one trade-one contract" requirement should be reimposed.[4] As a result of petitioners' challenge to the rule making format, a full evidentiary hearing was held, at the conclusion of which, the examiner, in an initial decision, upheld petitioners' dual rate contracts under section 14b. However, upon exception, the Commission once again imposed the condition that the conference offer its dual rate contract in *each* of the five trade areas,[5] relying upon the failure of petitioner to meet

4. Earlier, on February 16, 1966, the Commission approved the dual rate contract currently in use by petitioners. *See Agreement No. 8660-Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System,* 12 F.M.C. 149, 151 n.3 (1969).

5. *Id.*

the "public interest" standard promulgated by the Commission in *Investigation of Passenger Travel Agents,* 10 F.M.C. 27 (1966), and affirmed by the Supreme Court in *Federal Maritime Comm. v. Svenska Amerika Linien, supra,* 390 U.S. at 243 wherein the Court upheld the Commission's test that

> . . . conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can "bring forth such facts as would demonstrate that the [restraint] was required by a serious transportation need, necessary to secure important public benefits or in the furtherance of a valid regulatory purpose of the Shipping Act.

C. *Phase Three*

The Conference, again protesting the decision moved the Commission to reopen the proceeding to afford it an opportunity to meet the new burden of proof imposed by *Svenska.* The Commission, acquiescing in a reopening, nevertheless, reaffirmed its previous "one trade-one contract" decision rejecting the examiner's initial decision once again. The Commission, noting that "the exclusive patronage tying arrangement embodied in a dual rate contract would clearly run counter to the antitrust laws," (J.A. 177-78) concluded, that, under *Svenska,* this fact standing alone rendered petitioners' dual rate contracts "contrary to the public interest," and shifted the burden to petitioners of introducing "other evidence in the record [which] fairly detracts from the weight of this factor [antitrust conflict]" by demonstrating "the necessity for this restraint in terms of legitimate commercial objectives." *Federal Maritime Comm. v. Svenska Amerika Linien, supra,* 390 U.S. at 244, 246. Examining petitioners' evidence, the Commission ". . . remain[ed] unconvinced . . . that the

present so-called single-contract system is required by some serious transportation need, necessary to secure important public benefits or in furtherance of any valid regulatory purpose of the Shipping Act." (J.A. 178). The Commission concluded that much of petitioners' evidence confused advantages, attributable to the conference format with those resulting from the dual rate contracts and accordingly ruled against petitioners.

Before turning to the specific arguments advanced and issues raised on appeal, it will, in our view, facilitate matters to briefly examine the nature of the antitrust-regulatory conflict and cursorily survey the vagaries of the ocean shipping industry.

II. *Accommodation of Regulatory and Antitrust Policies*

Forced to steer a course between a regulatory Scylla and an antitrust Charybdis, we pause for a moment to reflect upon the rhyme and reason of our voyage.

Although the policies underlying the antitrust laws[6] and the regulatory agency statutes are conflicting,[7] their purposes—service to the public—are complementary. As we indicated in *Northern Natural Gas Co. v. Federal Power Comm.*, 130 U.S.App.D.C. 220, 226, 399 F.2d 953, 959 (1968), they both attempt to "achieve the most efficient allocation of resources possible" and to "establish an atmosphere which will stimulate innovations for better service at a lower cost." *See also Symposium on 'Regulated' Industries and Antitrust*, 32 A.B.A. ANTITRUST L.J. 239-41 (1966).

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6. The basic antitrust legislation is found in the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1970); the Clayton Act, 15 U.S.C. §§ 12-27 (1970); and the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1970). *See generally* HOUSE SELECT COMM. ON SMALL BUSINESS, 89TH CONG. 2D SESS., CONGRESS AND THE MONOPOLY PROBLEM: HISTORY OF CONGRESSIONAL ACTION IN THE ANTITRUST FIELD 1890-1966 (Comm. Print 1966).

7. *See* C. FULDA, COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION 1-5 (1961).

It is all too clear that "[t]he general objective of the antitrust laws is promotion of competition in open markets."[8] As Justice Black has eloquently observed, "[the antitrust laws were] designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. [They rest] on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4 (1958). The Supreme Court has "long recognized that the antitrust laws represent a fundamental national economic policy . . .," *Carnation Co. v. Pacific Conference,* 383 U.S. 213, 218 (1966), and often commented upon "the indispensable role of antitrust policy in the maintenance of a free economy." *United States v. Philadelphia National Bank,* 347 U.S. 321, 348 (1963). *See Marine Space Enclosures, Inc. v. Federal Maritime Comm.,* 137 U.S.App.D.C. 9, 420 F.2d 577 (1969); *Pacific Seafarers, Inc. v. Pacific Far East Line Inc.,* 131 U.S.App.D.C. 226, 237, 404 F.2d 804, 815 (1969). Indeed, they have been deemed important enough to be denominated the "Magna Charta of free enterprise." *United States v. Topco Associates, Inc.* 40 U.S.L.W. 4343, 4348 (U.S. March 29, 1972).

There are, on the other hand, particular economic or social objectives sought by Congress which are unattainable through the free forces of competition. In seeking

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8. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (1955). *See generally* C. KAYSEN & D. TURNER, ANTITRUST POLICY 11-22 (1959); Bork, Bowman, Blake & Jones, *The Goals of Antitrust: A Dialogue on Policy,* 65 COLUM.L.J. 363 (1965).

these goals Congress has therefore established regulatory agencies to supervise certain industries. "Regulation of a specific industry . . . 'evidences congressional recognition that competition can assure protection of the public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are monopolies because public grant, the exigencies of nature, or legislative preference for a particular way of doing business.' " *S.S.W., Inc. v. Air Transport Ass'n of America,* 89 U.S.App.D.C. 273, 276, 191 F.2d 658, 661 (1951). "Of course, the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest necessarily requires in each case a blend of private forces and public intervention." *Federal Communications Comm. v. RCA Communications, Inc.* 346 U.S. 86, 93-4 (1953).

In those areas in which Congress has felt that competition is less appropriate, it has exempted the industries from the operation of the antitrust laws. *See* C. Kaysen & D. Turner, Antitrust Policy 41-43 (1959). The reasons generally advanced for these exemptions are: 1) disparity of economic power; 2) assistance for American businessmen against foreign competition; 3) incentives for research and development; 4) national defense needs; 5) maintenance of favorable federal-state relations; 6) the inherent nature of the activity; and 7) tradition.[9]

Various tests have been proposed for determining when antitrust exemptions should be granted. The better school of thought is that no exemptions should be permitted unless necessary to carry out the purpose of the statute. *Thill Securities Corp. v. New York Stock Exchange,* 433

9. Pogue, *The Rationale of Exemptions from Antitrust,* 19 A.B.A. Antitrust Section 313 (1961).

F.2d 264, 268 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) *quoting Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). *See also*, Comment, *Accommodations of Antitrust Law and Ocean Shipping Regulation*, 4 TEXAS INT'L L. FORUM 393, 409-12 (1968). An opposing school of thought is that once a regulatory agency has intervened in an industry, the antitrust laws should not apply unless the agency cannot effectively regulate the industry. Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U.PA.L.REV. 46, 58-59 (1962).

Some of the antitrust exemptions have been explicitly set forth in regulatory statutes. *E.g.*, Shipping Act, 46 U.S.C. § 814; Federal Communications Act, 47 U.S.C. §§ 221(a), 222(c)(1); Federal Aviation Act, 49 U.S.C. § 1384; Interstate Commerce Act, 49 U.S.C. §§ 5(11), 5(b) 9; Webb-Pomerene Act, 15 U.S.C. § 62. These exemptions must in any event be narrowly construed. *Maryland & Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458 (1960); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

Where the exemptions are not express, they must of course be inferentially gleaned, if at all, from the statute. However, we cannot overemphasize that "immunity from the antitrust laws 'is not lightly implied'." *United States v. First City National Bank of Houston*, 386 U.S. 361, 368 (1967) *quoting California v. Federal Power Comm.*, 369 U.S. 482, 485 (1962). *See Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456 (1945). This cardinal rule of construction disfavoring lacunae in the application of antitrust laws has been applied to a myriad of industries faithfully catalogued in the following cases. *Northern Natural Gas Co. v. Federal Power Comm., supra*, 130 U.S. App.D.C. at 226-27, 399 F.2d at 959-60; *Alabama Power Co. v. Alabama*

Electric Cooperative, Inc., 394 F.2d 672, 682-83 (5th Cir. 1968) (Godbold, J., dissenting). Indeed, there is a presumption that antitrust principles apply unless a contrary intent appears expressly or by necessary implication. *Cities of Statesville v. Atomic Energy Comm.*, 142 U.S.App.D.C. 272, 297, 441, F.2d 962, 987 (1969) (*en banc*) (Leventhal, J., concurring). *See also Sabre Shipping Corp. v. American President Lines, Ltd.*, 285 F.Supp. 949, 953 (S.D.N.Y. 1968), *cert. denied sub nom., Japan Line Ltd. v. Sabre Shipping Corp.*, 395 U.S. 922 (1969). As the Supreme Court has emphasized, "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank, supra,* 374 U.S. at 350-51 (footnotes omitted) and authorities cited therein. *See S.S.W. Inc., v. Air Transport Ass'n. of America, supra,* 89 U.S. App.D.C. at 276, 191 F.2d at 661 (1951). Even where the agency's particular statutory standard requires that it override antitrust principles, this "does not compel unawareness of antitrust policies, and the agency may well be able to harmonize diverse and even competing policies." *Cities of Statesville v. Atomic Energy Comm., supra,* 142 U.S.App.D.C. at 297, 441 F.2d at 987 (Leventhal, J., concurring). *See McLean Trucking Co. v. United States,* 321 U.S. 67, 79 (1944). In essence then, the duty of the agencies and courts is to accommodate or harmonize antitrust and regulatory principles. *See Seaboard Airlines R.R. v. United States,* 382 U.S. 154, 156 (1965) *quoting Minneapolis & St. L. Ry. v. United States,* 361 U.S. 173 (1959). Indeed, regulatory agencies have long used the antitrust laws to give "understandable content to the broad statutory concept of 'the public interest' " often found in their statutory charters. *Federal Maritime Comm. v. Svenska Amerika*

Linien, supra, 390 U.S. at 244. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm.,* 390 U.S. 261, 274 n.20 (1968); *Denver & Rio Grande Western R.R. Co. v. United States,* 387 U.S. 485, 492-94 (1967); *California v. Federal Power Comm., supra,* 369 U.S. at 484-85; *United States v. Radio Corporation of America,* 358 U.S. 334, 351 (1959); *McLean Trucking Co. v. United States, supra,* 321 U.S. at 79-80; *City of Pittsburgh v. Federal Power Comm.,* 99 U.S. App.D.C. 113, 237 F.2d 741 (1956).

With this background we now proceed to an examination of the ocean shipping industry in light of the relevant criteria including "the specific language of the congressional statute involved, any legislative history which would throw light on the congressional intent, the relative importance of the governmental action which is asserted to override antitrust policy, whether the governmental agency is required to take into consideration the possible anticompetitive effect of its actions, whether the agency is required to adhere to a clearly defined and restricted statutory directive, and to what exent the agency's actions are subject to judicial review." *Hecht v. Pro-Football Inc.,* —— U.S.App.D.C. ——, ——, 444 F.2d 931, 935 (1971).

III. *The Ocean Shipping Industry—Statutory Framework and Svenska*

A. *The Shipping Act of 1916—Rationale and Content*

Shipping conferences, organizations of steamship lines whose members regularly transport cargo, were organized to limit the competition which would otherwise exist between its members and to insulate member carriers from non-member carrier competition. Conferences were found necessary to combat the cutthroat competition and resulting business failures among shipping lines which often depressed the rates charged by the carriers to the cost of the voyage itself.[10] Once established, the conference mem-

10. D. Marx, International Shipping Cartels 19-22 (1953).

bers agreed among themselves upon matters such as rates, market quotas and sailing dates.

The six economic factors most frequently cited to justify the existence of the conference system are: 1) ease of market entry; 2) the industry's rigid fixed and operating cost structure; 3) the absence of any governmental control over the level of ocean freight rates; 4) the difference in operating costs of similar vessels flying different flags; 5) the almost invariable imbalance between inbound and outbound cargo; and 6) overtonnaging.[11]

In the early part of the twentieth century these conferences came under close scrutiny by the British Royal Commission on Shipping Rings which published a report in 1909. After extended study the Commission concluded that conferences should be permitted to continue since they encouraged regular dependable service at relatively stable rates. Several years after the report of the Royal Commission the House Committee on the Merchant Marine and Fisheries, of which Representative J. W. Alexander was chairman, undertook an exhaustive inquiry into the practices of shipping conferences. The Committee's findings, contained in what has become known as the Alexander Report,[12] resulted in the conclusion that while certain

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11. S. Rep. No. 860, 87th Cong., 1st Sess. 5-6 (1961).

12. The work of the Committee is set forth in three volumes of hearings and diplomatic and consular reports. *Proceedings of the House Comm. on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations under House Resolution 587*, 62nd & 63d Cong. (1913-14). The Committee's recommendations are contained in a fourth volume. *House Comm. on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations*, H.R. Doc. No. 805, 63rd Cong., 2d Sess. (1914).

conference practices needed correcting, the conference system as a whole was a worthwhile device.[13] Among the advantages listed were those such as "greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination."[14] The Report concluded that these advantages could only be preserved "by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control."[15]

The basic recommendations of the Alexander Report were enacted into law by Congress in the Shipping Act of 1916.[16] Section 15 of the Act required certain conference agreements to be filed with an appropriate governmental body for approval.[17] Approved agreements were

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13.

> The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. . . . To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.

Alexander Report, supra, note 12, at 416.

14. *Id.*

15. *Id.*

16. Act of Sept. 7, 1916, Ch. 451, § 1, 39 Stat. 728, *as amended,* 46 U.S.C. §§ 801-842 (1970).

17. 39 Stat. 733, *as amended,* 46 U.S.C. § 814 (1970).

exempted from the antitrust laws. Other sections of the act prohibited certain prevalent anticompetitive[18] and discriminatory practices.[19] The Act did not, however, speak to another anticompetitive device — dual rates — subsequently adopted by many conferences.[20]

The dual rate system was successfully employed by conferences until the Supreme Court's decision in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958), where the Court held that such agreements were illegal "where they [were] employed as predatory devices." *Id.* at 499. The Court's decision, casting a pall over dual rate contracts, prompted the Congress to enact interim legislation to neutralize the Court's holding by preserving the legality of dual rate contracts in effect at the time of the *Isbrandtsen decision.*[21] Following an extensive three year investigation, the Congress enacted permanent legislation, the 1961 amendments to the Shipping Act.

B. *The 1961 Amendments to the Shipping Act*

Three subcommittees of Congress—the Antitrust Subcommittee of the House Judiciary Committee, the Subcommittee on Steamship Conferences of the House Merchant

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18. Section 14 prohibited carriers from boycotting a shipper for patronage of another carrier. It also forbade the use of "fighting ships"—ships assigned by the conference to underbid independent competitors with distribution of resulting losses among conference members—and deferred rebates, a rebate given to a shipper for a specified period of exclusive patronage. § 14, 39 Stat. 733, *as amended*, 46 U.S.C. § 812 (1970).

19. Section 16 outlawed undue prejudice against any person, locality or type of traffic. § 16, 39 Stat. 734, *as amended* 46 U.S.C. § 815 (1970). Section 17 prohibited discriminatory rates against particular ports or American exporters. § 17, 39 Stat. 734, *as amended*, 46 U.S.C. § 816 (1970).

20. H. Rep. No. 1419, 87th Cong., 2nd Sess. 185-87 (1962).

21. P.L. 85-626, 72 Stat. 574 (August 12, 1958), *as amended*, P.L. 86-542, 74 Stat. 253 (June 29, 1960), P.L. 87-75, 75 Stat. 195 (June 30, 1961).

Marine and Fisheries Committee, and the Merchant Marine and Fisheries Subcommittee of the Senate Commerce Committee—conducted exhaustive investigations into the operations of shipping conferences in international trade. The House Merchant Marine and Fisheries Committee concluded that dual rate contracts were necessary to ensure strong conferences, which, although not flawless, did offer certainty of rates and scheduling redounding to the benefit of all.[22] The Antitrust Subcommittee of the House Committee on the Judiciary, naturally more antitrust oriented, placed greater emphasis upon the predatory anticompetitive devices of the conferences.[23] "The Bill which was finally passed in the House reflected the fundamental conflict in approach to the regulation of the industry pursued and adopted by the two committees." *American Export Isbrandtsen Lines v. Federal Maritime Comm.*, 127 U.S. App.D.C. 62, 70, 380 F.2d 609, 617 (1967).

The Senate hearings were primarily concerned with reconciling some of the contradictory provisions in the House bill. The bill as reported out by the Senate[24] was more antitrust exemption oriented than that which passed the House.[25] The bill as finally reported out by the House-

22. H. Rep. No. 498, 87th Cong., 1st Sess. (1961).

23. H. Rep. No. 1419, *supra*, note 20.

24. S. Rep. No. 860, *supra*, note 11.

25. *See* Note, *Rate Regulation in Ocean Shipping*, 78 Harv. L.Rev. 641 (1965).

Senate Conference and enacted into law adopted essentially the Senate approach.[26] As we have said it was "largely a triumph for the conference interests in that most of the antitrust aspects of the legislation were deleted and dual rate contracts were legalized."[27] *American Export Isbrandtsen Lines v. Federal Maritime Comm., supra,* 127 U.S.App.D.C. at 70, 380 F.2d at 617.

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26. Act of Oct. 3, 1961, P.L. 87-346, § 2, 75 Stat. 763, *as amended,* 46 U.S.C. § 814 (1970).

Basically, the difference between H.R. 6775 as it passed the House and passed the Senate is in the manner of approach in four major respects.

(1) The House bill declared exclusive patronage shipping contracts between carriers and shippers to be prohibited except upon prior approval by the appropriate Federal Government agency (now Federal Maritime Commission) and required that the use of such contracts by steamship conferences or individual steamship companies could be approved only if they met certain specified criteria and standards. The bill as it passed the Senate eliminated the prohibition language and affirmatively permitted the use of dual rate, or exclusive patronage, contracts.

(2) The bill as it passed the House made it mandatory that all criteria be affirmatively met before the use of exclusive patronage contracts would be permitted and conference agreements approved by the Commission. The Senate version would permit the use of exclusive patronage contracts unless the Commission made findings to the contrary.

(3) The bill as it passed the House contained several major provisions intended to protect the status of independent carriers who might choose not to join a conference but which would, at the same time, give the conferences full and fair opportunity to operate with effective dual-rate systems. The bill as it passed the Senate, for the most part eliminated all such provisions of an antitrust nature.

(4) The bill as it passed the House provided that conferences of carriers or individual carriers operating in the foreign commerce of the United States must designate persons upon whom service of process may be made within the United States and provide records or other information, wherever located, required by any order of the Commission. These features were stricken from the bill in the Senate version.

As agreed upon, by the conferees, the bill in major respects conforms with the Senate approach on the foregoing points.

Index to Legislative History, supra, note 2, at 444.

27. *See Antitrust Exemptions: Ocean Shipping Conferences,* 33 A.B.A. Section of Antitrust Law 56, 61 (1967).

The 1961 amendments made for our purposes several relevant changes in the law. Section 15 was amended to provide considerably broader Commission authority by permitting disapproval of any conference agreement found to be "contrary to the public interest."[28] Section 14b, the heart of the 1961 amendments, was added to provide that

> the Commission . . . shall . . . permit [dual rate agreements] . . . unless the Commision finds that the contract . . . will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors.[29]

In addition to the above requirements, Congress provided that in order to obtain Commission approval under § 14b, dual rate agreements must meet eight other specific requirements as well as a ninth requirement that the contract shall contain "such other provisions not inconsistent herewith as the Commission shall require or permit."

C. *Svenska*

The 1961 amendments came before the Supreme Court for the first time in *Svenska*. In that case the Court upheld the Commission's requirement that conference restraints which interfere with the policies of the antitrust laws be approved only if the conference can bring forth such facts as would "demonstrate that the [restraint] is required by a serious transportation need, or in order to secure important public benefits." The Court concluded that the 1961 amendments did not confer absolute antitrust immunity on conferences and that the test formulated by the Commission was an appropriate refinement of the "public interest" standard added to § 15 by the 1961 amendments.

28. § 1, 75 Stat. 763, 46 U.S.C. § 814 (1970).

29. § 2, 75 Stat. 762, 46 U.S.C. § 813a (1970).

IV. *The Issues and their Resolution*

On appeal petitioners advance several theories for setting aside the Commission's order. Distilled to the essence, these theories number two. First, petitioners urge that the Commission committed error in relying upon the rationale and standards of *Svenska* in that the principles were intended to apply only to § 15 of the Act, not § 14b. Furthermore, they urge that the unique factual circumstances in *Svenska* bar its application to the instant case. Petitioners' second contention is that even if we should find that the Commission's simulated *Svenska* test used in the case *sub judice* is proper, the Commission misapplied it and improperly evaluated the evidence in arriving at its conclusion.

A. *Commission Properly Found that the Rationale and Standards of Svenska Apply*

The Commission relied upon *Svenska* in two ways. First, it used *Svenska* to find that under § 14b incompatibility with the antitrust laws is a sufficient reason for denying immunity from these laws. Second, it relied upon *Svenska* to justify placing the burden of proof upon petitioners. Although not without difficulty, we must conclude that these dual applications of *Svenska* are neither arbitrary nor capricious.

1. *Svenska: Antitrust Immunity*

Petitioners' contention that the purpose of the statutory scheme would be defeated if incompatibility with the antitrust laws can be a sufficient reason for denying immunity from these laws is untenable. As the Court recognized in *Federal Maritime Comm. v. Svenska Amerika Linien, supra*, 390 U.S. at 242-43, the Shipping Act of 1916 conferred only *limited* antitrust immunity upon the shipping industry. We have recently made mention of this very

fact in *Seatrain Lines, Inc. v. Federal Maritime Comm.*, No. 71-1093, slip op. at 16 (D.C. Cir. March 23, 1972) where we observed

> that Congress intended to tolerate only the *minimum* anticompetitive behavior necessary to preserve an essentially competitive structure in the maritime industry by striving to avoid either the failure or consolidation of independent steamship lines by the method of government supervision of anticompetitive working arrangements. While Congress recognized that in order to accomplish this result a measure of competition might have to be sacrified, such as permitting agreement on rates or pooling of earnings, it did not intend thereby to remove *all* effective competition. (Emphasis supplied).

The 1961 amendments were not intended to do away with this limited immunity. As the Senate Report indicated:

> The hearings of the committee have made it quite clear that our traditional antitrust concepts cannot be *fully* applied to this aspect of international commerce. Your committee has concluded that any attempt to effect regulation of this commerce in a measure *comparable* to that applied to our domestic commerce would be highly detrimental to our essential American-flag merchant marine. (Emphasis supplied).[30]

The House Report similarly commented that "[t]he committee believes that the present bill represents a *minimum* but necessary deviation from the concepts of the antitrust law." (Emphasis supplied).[31]

It is noteworthy that the 1961 amendments articulated a "public interest" standard couched in substantially sim-

30. S.REP. No. 860, *supra*, note 11, at 2.

31. H.REP. No. 498, *supra*, note 22, at 12.

ilar language in both sections 15 and 14b.[32] The Court in *Svenska* indicated that the "public interest" standard embodied in section 15 included antitrust considerations. We see no reason to reach a different conclusion with regard to section 14b in light of the legislative history and rules of construction cited above. We feel that the ambiguities, if any, should be resolved in favor of free competition. *McLean Trucking v. United States, supra,* 321 U.S. at 94 (Douglas, J., dissenting).

2. *Svenska: Burden of Proof*

Petitioners assert that the mandatory language and legislative history of section 14b preclude imposing the burden of proof upon them. Admittedly, section 14b appears mandatory. The statute provides that the "Commission . . . *shall* . . . permit [dual rate contracts] . . . *unless* the Commission finds that the contract . . . will be detrimental to the commerce of the United States as contrary to the public interest, or unjustly discriminatory or unfair . . . ." (Emphasis supplied). However, the language of section 15 is no less mandatory. Section 15 provides that the "Commission *shall* . . . disapprove . . . any agreement . . . it finds to be unjustly discriminatory or unfair . . ., or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest . . ., and *shall* approve all other agreements." (Emphasis supplied). Despite this mandatory language in section 15, the Supreme Court has permitted imposing the burden of proof upon conferences in section 15 proceedings. We see no reason to differ with respect to section 14b, despite petitioners [sic] assertions that the legislative history dictates an opposite result.

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32. The language of section 14b is: "detrimental to the commerce of the United States or contrary to the public interest."
Section 15 uses the following words: "detriment of the commerce of the United States or to be contrary to the public interest."

Petitioners also rely upon a change in the statutory language of § 14b. As introduced in the House, the bill required the Commission to make an affirmative finding that § 14b contracts would be in the public interest. However, as enacted, the positive finding requirement was deleted from § 14b.[33] Petitioners intimate that this evinces an intent to place the burden of proof upon the Commission. In rejecting such an analysis, we again refer to *Svenska* where the Court interpreted § 15, which similarly requires no affirmative showing by the Commission, as susceptible of placing the burden of proof upon petitioners.[34] Futhermore, the excision of the affirmative showing requirement may have been thought useful, as the Senate Report observes, in that it allows easy cases to be disposed of quickly without building an extensive record.[35]

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33. *See* H.REP. No. 498, *supra*, note 22, at 18 where the Federal Maritime Board expressed its dissatisfaction with the positive finding requirement, particularly with respect to § 15.

> At page 4, lines 15 and 16, we recommend that the words "that it affirmatively finds to be in the public interest" be stricken. In conformity with other similar statutes, such as the Aviation Act of 1958, we believe that, if a public interest standard is to be applied by the Board, it should be phrased in terms of permitting the approval of agreements which the Board does not find to be adverse to the public interest. See 49 U.S.C. 1382(b). Requiring a positive finding in favor of the public interest would prevent carriers from operating under arrangements which, although not meriting disapproval under the standards of the statute, could not be shown to positively contribute to the public interest.

34. A similar argument was unsuccessfully pressed by Respondents in *Svenska*. *See* Supreme Court Brief for Respondents, in *Svenska* at 61-62.

35. *See* S.REP. No. 860, *supra*, at 23.

> 2. *In view of the [nine] specific safeguards which must be in dual-rate contracts before the Commission may approve them, must the Commission also be required to make findings, based on substantial evidence, that the contracts are not (1) detrimental to the commerce of the United States, or (2) contrary to the public interest, or (3) unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors?* (Emphasis in original).

Turning from the language of the statute to the legislative history of § 14b, we candidly admit that our statutory exegesis is not without difficulty, however, in light of the general rules of construction cited herein, we conclude that the Commission's approach to § 14b and *Svenska* is not arbitrary, unreasonable or capricious.

Petitioners, asserting that the legislative history of § 14b indicates that Congress did not intend to place the burden of proof upon the proponents of dual rate contracts, place particular reliance upon the following passage in the Senate Report:

> Your committee believes that if the [nine] specific requirements set forth in its amendments are met by the proposed contract, it should be entitled to Commission approval unless the Commission finds that the contract would be detrimental to the commerce of the United States, or contrary to the public interest, or unjustly discriminatory or unfair. *We believe that any contract which contains the [nine] safeguards expressly required by the amended bill makes out a prima facie case that the contract is not detrimental to our commerce, or contrary to our public interest, or unjustly discriminatory or unfair.* (Emphasis supplied).[36]

In addition to [nine] specific safeguards which must be in each dual-rate contract, the bill as it passed the House would require the Commission to find that the contract was (1) not intended to or reasonably likely to cause the exclusion of any other carrier from the trade, (2) not detrimental to the commerce of the United States, and (3) not contrary to the public interest.

Your committee concluded that in order for the Commission to make these additional findings, the parties applying for permission to use dual-rate contracts would have to build extensive records before the Commission, even though there might be no opposition to the contracts, and even though they might clearly contain the [nine] matters expressly required by statute.

36. S.Rep. No. 860, *supra*, note 11, at 23. *See also Id.* at 33-34.

Even assuming this passage is as important as petitioners would have us believe, they have overlooked what the Ninth Circuit has denominated an "all-important proviso,"[37] section 14b(9), which states the Commission shall approve contracts filed provided that the contract expressly "contains such other provisions not inconsistent herewith as the Commission shall require or permit." Assuming the passage in the Senate Report is as noteworthy as petitioners contend, we conclude, mindful of the maxims of construction herein cited, that the Commission was empowered to include consideration of antitrust principles under § 14(b)9, thereby requiring petitioners to surmount antitrust hurdles prior to taking advantage of the "prima facie" language in the Senate Report. We do not find such an interpretation to be inconsistent with the Shipping Act.

Although the legislative history of § 14b(9) is not free of doubt, we believe it supports an expansive reading. Enacted in substantially the same form as introduced,[38] § 14b(9) was intended to confer upon the Commission a "broad rulemaking mandate."[39] Despite opposition to § 14b(9) from the shipping industry on the ground that it would give the Commission too much discretion,[40] Congress enacted the clause. Its purpose was to provide flexibility in the hands of the Commission.[41] Indeed, it was referred to

37. Pacific Coast European Conference v. United States, 350 F.2d 197, 203 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965).

38. *Index to Legislative History, supra*, note 2, at 22.

39. *Id.* at 213.

40. *Hearings Before the Merchant Marine and Fisheries Subcomm. of the Senate Comm. on Commerce on H.R. 6775*, 87th Cong., 1st Sess. 241, 520-21, 534 (1961).

41. *Hearings Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine and Fisheries on H.R. 4299*, 87th Cong., 1st Sess. 33 (1961).

as a "catchall"[42] during the hearings.[43] Furthermore, the legislative history indicates that the Commission was empowered to "establish minimal standards, for dual rate contracts *beyond* those set forth in Public Law 87-346." (Emphasis supplied.)[44]

In our view the imposition of the *Svenska* burden does not pose an insurmountable obstacle for petitioners. As we have said, "parties alleging anticompetitive conditions in proceedings before other agencies are frequently afforded the benefit of generous presumptions and shifts in burden of proof once they have demonstrated the existence of nonfrivolous antitrust questions." *Hale v. Federal Communications Comm.*, 138 U.S.App.D.C. 125, 133, 425 F.2d 556, 564 (1970) (Tamm, J., concurring). Many scholars have also approved placing the burden of proof upon those seeking antitrust limitations.[45] As the Supreme Court indicated in *Svenska*, placing the burden of proof upon the conference does not make the limited antitrust immunity conferred by the Shipping Act illusory because actions which would violate antitrust laws may still be approved if sufficient justification for them exists. Furthermore, the Commission must, of course, adduce substantial evidence to support its finding of a statutory reason—*e.g.*,

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42. "Catchall" has been used in similar contexts. *See* Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 492 (1958); Seatrain Lines, Inc., v. Federal Maritime Comm., No. 71-1093, slip op. at 5 n.4 (D.C. Cir. March 23, 1972).

43. *Hearings Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine and Fisheries on H.R. 4299*, 87th Cong., 1st Sess. 491 (1961).

44. H.Rep. No. 1419, *supra*, note 20, at 390.

45. *See, e.g.*, Baker, *The Antitrust Division, Department of Justice: The Role of Competition in Regulated Industries*, 11 B.C. Ind. & Com. L.Rev. 571, 591 (1970); Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv.L.Rev. 1207, 1238 (1969).

contrary to public interest—for disapproving the contract, "but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor." *Federal Maritime Comm. v. Svenska Amerika Linien, supra,* 390 U.S. 245-46. It is to this end which we now turn our inquiry.

B. *Commission Properly Found that Petitioners Failed to Meet Their Burden of Proof*

Our function on appeal is to determine whether there is substantial evidence in the record to support the conclusions reached by the Commission. *Consolo v. Federal Maritime Comm.,* 383 U.S. 607, 618-21 (1966); *Swayne & Hoyt Ltd. v. United States,* 300 U.S. 297 (1937). In so doing we must recall that the Commission is entitled to draw reasonable inferences from the evidence. *Federal Maritime Comm. v. Svenska Amerika Linien, supra,* 390 U.S. at 248. Pursuing our statutory duties we must defer, as we do in the primary jurisdiction doctrine,[46] to agency expertise where appropriate, *American Export Isbrandtsen Lines v. Federal Maritime Comm., supra,* 127 U.S. App.D.C. at 93, 380 F.2d at 620, however, we must be wary for "the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia." *Volkswagenwerk v. Federal Maritime Comm., supra,* 390 U.S. at 272 *quoting American Ship Building Co. v. National Labor Relations Board,* 380 U.S. 300, 318 (1965). Our scope of review has only been recently summarized by the Fifth Circuit in *Port of New York Authority v. Federal Maritime*

46. *See* Far East Conference v. United States, 342 U.S. 570, 574-75 (1952); United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932). *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 19.05-19.07 (1958).

Comm., 429 F.2d 663, 670 (5th Cir. 1971), *cert. denied*, 401 U.S. 909 (1971).

> It is to be noted preliminarily that this review is in the frame of reference of a review involving the expertise of an administrative agency. . . . As to fact questions, we must consider whether the order in question is supported by substantial evidence. We are not to review the matter de novo nor are we to substitute our discretion for that of the Commission. Congress created the Commission to provide a forum for the solution of the technical and complex matters involved in the shipping industry.

At the outset, we note that this is not the first time we have upheld a Commission finding that a dual rate contract violated the Shipping Act where the contract obligated the shipper to more than one trade area. *See U.S. Atlantic & Gulf Australia-New Zealand Conference v. Federal Maritime Comm.*, 124 U.S.App.D.C. 303, 364 F.2d 696 (1966).

In light of our conclusion that the burden of proof rests upon petitioners, not the Commission, we must consider whether petitioner did in fact meet this burden. Eleven witnesses, including conference officials, carrier representatives and freight forwarders, testified on petitioners' behalf. Basically, all the testimony[47] favored petitioners' dual rate contract proposal.[48] The justifications advanced

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47. Dow Chemical Co. which originally had objected to the dual rate contracts subsequently withdrew its objection. *Agreement No. 8660, Latin America Pacific Coast Steamship Conference & Proposed Contract Rate System, supra*, note 4, 12 F.M.C. at 151 n.3.

48. Petitioners urge that *Svenska* has no application to the instant case since in *Svenska*, unlike the case *sub judice*, there was opposition to the proposed contracts and allegations of harm. We find no such limitation express or implied in *Svenska*. Furthermore, the point is not so much who or how many are opposed to the contract, but rather what are the legitimate commercial objectives to be achieved by the proposal.

for the proposal included increased rate stability, better service and increased investment incentive. However, petitioners were unable to demonstrate either that these advantages were due to the two-contract system or that these advantages would cease upon enactment of a five-contract system. As the Commission indicated after a thorough reveiw of the evidence, the witnesses often confused and were unable to distinguish advantages derived from conference amalgamation and the dual rate contract system.[49]

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49. As the Commission indicated one could conclude from the testimony that the advantages were due to establishment of the conference system just as easily as due to the petitioners' contract rate system. The Commission offered the following illustrative testimony.

Q. Mr. Flook, you have been a party to, signatory to the dual rate contract since 1961?
A. Yes.
Q. And you indicate in your written testimony that it has been your experience that the rate agreement covering the three southbound and two northbound has resulted in improved service; is that correct? [*sic*]
A. Yes.
Q. On the part of the Conference?
A. Yes.
Q. What are you comparing that to?
A. Well, we are comparing that to the previous system where there were 10 individual rate agreements.
Q. So since the Federal Maritime Commission's approval of the super conferences, we might call it, you have gotten better service?
A. We have, yes.
Q. In your opinion, is this attributable to the amalgamation of separate conferences into one?
A. Yes, it is an ability by the Conference, I feel, to better structure rates.
Q. I don't understand that.
A. Well, with the Conference controlling the five different trade areas, three southbound and two northbound, we feel that it offers the lines a greater opportunity through the participation of the European lines that do service the area, to offer better service both north and southbound.
Q. When you say better service, can you be a little bit more specific there?

Indeed, some witnesses assumed the choice was between petitioners' proposed contract and no contract, which, of course, was not the case.[50] What the Commission sought

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A. Well, as you perhaps know, there are several European lines which are carrying cargo from Europe to the Pacific Coast and they stop in on the way to Central America.
Q. And those European lines are members of the Conference?
A. Yes, and they bring cargo up to the United States, so we have the additional sailings which offer us more flexibility in bringing us cocoa beans at the time we need it, up to the United States.
Q. And prior to the approval of the super conference, the European lines were precluded from stopping into those Central American areas?
A. They were not precluded that I recall, but they did not offer it on a scheduled basis.
Q. More specifically, how has the imposition of the dual rate agreement increased the service to you? The dual rate agreement is completely apart from the approval of the Conference rate? [*sic*]
A. No, no. The dual rate agreement, in my opinion, offers to the line the opportunity to be assured of sufficient patronage which would justify the scheduling of vessels at regular intervals, and the receivers benefit through this scheduling.
Q. Has service increased from the time when the dual rate agreement was initially imposed on all areas?
A. It would be very difficult to answer that question because the service is dictated by the amount of cargo offerings. It may have decreased in the number of sailings both to the United States and from the United States on the Pacific Coast, but that might be due to the overall reduction in the volume of cargo moving and not attributable to the difference in the Conference structure today on what it was previously. [*sic*]
Q. Has there, in fact, been a diminution of service?
A. Not within the last two or three years I would say. Previous to that, I think, there were more sailings, yes.
Q. And what has accounted for the diminution of service?
A. As I said before, I think it is due to the lesser volume of cargo moving into these areas. I think there has been a greater industrialization in Latin America, and as a result it has affected some of the movement from the Pacific Coast of manufactured items.

J.A. 167-68.

50. The Commission cites the following example:
Mr. M. J. McCarthy, of the Freight Forwarders Association, stated that he had been in the shipping business for 41 years, and that this present contract system "better affords stability of rates", and that without the present contract system there

were specific answers to the following questions: What are the legitimate commercial objectives achieved by the present contract system, which objectives fairly detract from the weight of the loss of freedom of choice by the shipper? What transportation need is served by the present system? What important public benefits are secured by it? Is the present system imposed in furtherance of some valid regulatory purpose of the Shipping Act? J.A. 177. Petitioners, however, as the Commission noted, failed to provide satisfactory non-speculative answers.

We should bear in mind that the Commission did not disapprove of the dual rate contract concept, but merely placed limitations upon its use. Such action is clearly in accord with our national policy that only the least restrictive inroads into free competition will be tolerated.[51] Absent the protection of section 14b, the exclusive patronage tying system ebmodied in a dual rate contract would clearly run counter to the antitrust laws. Having failed to present sufficient evidence which detracts from the weight of this antitrust factor, we find the Commission's conclusion that petitioners' proposed dual rate contracts are contrary to the public interest to be based upon substantial evidence and, accordingly, affirm the Commission's order.

So ordered.

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would be no rate stability. When Hearing Counsel asked whether the shipper should have the option of shipping conference or non-Conference, Mr. McCarthy stated:

> If you put it that way, Mr. Tell, forget about the Conference, just break them up and forget about it if you're going to give the latitude where he can ship conference or non-Conference. If he has that latitude, I see no reason why he should have a Conference. Why don't you walk right into a rate war?

J.A. 170.

51. *See* Isbrandtsen Co. v. United States, 93 U.S.App.D.C. 293, 299, 211 F.2d 50, 57, *cert. denied*, 347 U.S. 990 (1954).

APPENDIX

Section 14b of the Shipping Act

Notwithstanding any other provisions of this chapter, on application the Federal Maritime Commission (hereinafter "Commission"), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests

himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discrimina-

tory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided, however,* That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part therof [sic] so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term "contract shipper" means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section.
46 U.S.C. § 813a (1970).

Section 15 of the Shipping Act

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic;

allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate polic-

ing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action. *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or

other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

46 U.S.C. § 814 (1970).

Appendix B

Federal Maritime Commission

Served
December 31, 1970
Federal Maritime Commission

Docket No. 1092

AGREEMENT NO. 8660—LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE AND PROPOSED CONTRACT RATE SYSTEM

The Latin America/Pacific Coast Steamship Conference dual rate contract system requiring signatory shippers to commit exclusive patronage to the Conference in all three outbound trade areas, found contrary to the public interest and, accordingly, not permitted approval under section 14b of the Shipping Act, 1916.

The Conference is required to amend Clause 2 of its dual rate contracts so that such contracts be offered separately in each trade area the Conference serves.

Robert L. Harmon, Esq. and *William J. Ziegler, Esq.* for Latin America/Pacific Coast Steamship Conference and member lines.

Donald J. Brunner, Esq., Robert H. Tell, Esq., G. Edward Borst, Esq. and *James N. Albert, Esq.,* Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, Chairman; James F. Fanseen, Vice Chairman; George H. Hearn, Commissioner.)*

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*Commissioner Ashton C. Barrett did not participate.

This proceeding is before us on exceptions to the Initial Decision of Examiner Edward C. Johnson in which he recommended the Latin America/Pacific Coast Steamship Conference be permitted the continued use of its currently employed exclusive patronage (dual rate) contrary system.

BACKGROUND

On January 15, 1962, certain steamship lines filed with the Commission Agreement No. 8660 for approval under section 15 of the Shipping Act, 1916, as amended. The purpose of this agreement was to form the Latin America/Pacific Coast Steamship Conference (Conference) which was to supersede ten existing conferences serving the trade inbound and outbound between ports on the West Coast of the United States and Canada and ports in Mexico, Central America, the Caribbean and the West Coast of South America.[1] Under Agreement No. 8660, this trade was divided into five so-called "trade areas" and it was provided that only carriers actively serving a particular trade could participate in matters affecting that area, e.g. ratemaking.

Subsequently, the signatories of No. 8660 filed a proposed "Shippers Rate Agreement" and a "Receivers Rate Agreement" with the Commission for approval under section 14b

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1. The ten predecessor conferences were:
No. 6670—Camexco Freight Conference
No. 6070—Canal, Central America Northbound Freight Conference
No. 6170—Capaca Freight Conference
No. 8390—Caribbean/Pacific Northbound Freight Conference
No. 7270—Colpac Freight Conference
No. 4294—Pacific Coast/Caribbean Sea Ports Conference
No. 7570—Pacific Coast/Mexico Freight Conference
No. 7170—Pacific Coast/Panama Canal Freight Conference
No. 4630—Pacific/West Coast South America Conference
No. 6270—West Coast South America/North Pacific Coast Conference

of the Shipping Act, 1916. It was proposed that the Shippers Rate Agreement, entitling shippers to lower rates for their exclusive patronage to conference lines, would be offered to all shippers in the three outbound trades, whereas the Receivers Rate Agreement would be offered to all receivers (or importers) in the two inbound trades.

On February 27, 1964, we instituted the original proceeding in this docket to determine:

> (1) Whether Agreement No. 8660, establishing the Latin America/Pacific Coast Steamship Conference, should be approved under Section 15, Shipping Act, 1916, and (2) whether the "Shippers Rate Agreement" and the "Receivers Rate Agreement" filed for use in connection with Agreement No. 8660, if approved, should be approved under Section 14(b), Shipping Act, 1916; . . .

After hearings, Examiner Edward C. Johnson issued an Initial Decision in which he approved both the conference agreement and the dual rate contracts, the latter with certain modifications not relevant here. Exceptions to the Initial Decision were taken by Hearing Counsel and certain interveners.

On March 30, 1964, we issued our Report in *The Dual Rate Cases,* 8 F.M.C. 16 (1964), which included our decision on the issues raised in Docket No. 1092, along with the decisions in approximately 60 other dockets then pending before us. We approved both Agreement No. 8660 and the Conference's dual rate contract form, provided, however, that a merchant not be required to obligate himself to exclusive patronage in all the five trade areas. In requiring that the Conference offer its dual rate contract in *each* of the five trading areas which it served, we had the following to say:

> The use of a dual rate contract by the new conference presents a special problem, however . . . . the

conference members themselves have recognized that five separate trade areas are involved and that a carrier who does not serve a particular trade should not be permitted to control the rates and practices in that trade. Yet, if the conference is permitted to offer a single dual rate contract which includes all five of the trade areas, merchants will be forced to obligate themselves to exclusive conference patronage in trade areas not desired in order to obtain contract rates in a trade area where they feel the dual rate contract meets their needs. This seems to us neither necessary nor fair.

We have approved the new agreement on the ground that it is largely concerned with providing a means of central administration for a number of conferences. In keeping with this, *we are approving the use of a dual rate contract in each of these five trade areas and merchants must be offered the privilege of executing a contract for any or all of the trade areas,* as they desire. We find that *it would be both contrary to the public interest and detrimental to commerce for the conference to require that a merchant obligate himself to exclusive patronage in all of these trade areas in order to obtain contract rates in a single trade. Any such requirement would, of necessity, bring into serious question the new conference arrangement itself.* (Emphasis ours)

The Conference appealed our decision in *The Dual Rate Cases, supra,* as it related to Docket No. 1092, to the U. S. Court of Appeals for the Ninth Circuit. The exact relief sought by the Latin America/Pacific Coast Steamship Conference in its appeal was set forth in its "Petition for Review of an Order of the Federal Maritime Commission", dated April 10, 1964:

> Petitioners pray that this Court declare invalid, permanently enjoin, set aside, and suspend the enforcement and carrying out of the said Order of the Federal

Maritime Commission insofar as the said Order prescribes a form of "Shippers Rate Agreement" to be used by the Conference, and that the said Shippers Rate Agreement be offered to "merchants" in each of the five trade areas covered by the Conference, and such other further relief as may be proper in the premises.

The Conference's appeal was consolidated for decision with appeals of the Pacific Coast European Conference and the Pacific Coast River Plate Brazil Conference from the Commission's orders issued in *The Dual Rate Cases* in Docket No. 1007 and Docket No. 1057, respectively.

On February 3, 1965, the Court handed down its decision in *Pacific Coast European Conference v. United States,* 350 F.2d 197 (C.A. 9, 1965), wherein it remanded the proceeding to allow us to cure certain procedural defects not relevant here. The Court, however, was silent concerning the Commission's requirement imposed in Docket No. 1092, that the Conference offer its dual rate contract in each of the five areas in which it operated.

Subsequently, after an evidentiary hearing, we reimposed the requirement that the Conference offer its dual rate contract in *each* of the five trade areas covered by the conference agreement. (See our earlier Report in this proceeding, 12 F.M.C. 149.) In doing so we concluded that respondents had failed to meet the test first espoused in *Investigation of Passenger Travel Agents,* 10 F.M.C. 27 (1966), and affirmed by the Supreme Court in *FMC v. Svenska Amerika Linien,* 390 U.S. 238 (1968), that:

> . . . conference restraints which interfere with the policies of the antitrust laws will be approved only if the conferences can "bring forth such facts as would demonstrate that the [restraint] was required by a serious transportation need, necessary to secure im-

portant public benefits or in the furtherance of some valid regulatory purpose of the Shipping Act." [390 U.S. 243]

Respondents, on February 4, 1969, petitioned the Commission to reopen the proceeding to afford them an opportunity "to meet the new burden of proof" imposed by "the rule of *F.M.C. v. Svenska Amerika Linien*", *supra*. They took the position that the *Svenska* decision, which "was not handed down by the Supreme Court until March 6, 1968, some six months after the close of the evidentiary hearings in this docket", constituted a "changed condition of law" and due process required that they be given an opportunity to prepare the record necessary to satisfy this "changed condition of law".

We granted respondents' petition to reopen and remanded the proceeding to the Examiner:

> . . . for taking of further evidence on the question of whether Respondents' present dual rate contract system is required by a serious transportation need, necessary to secure important public benefits or in the furtherance of some valid regulatory purpose of the Shipping Act.

In his Initial Decision, the Examiner found:

> . . . that the Latin America Pacific Coast Steamship Conference's present dual rate contract system has been shown to be required by serious transportation needs, is necessary to secure important public benefits and is in furtherance of the valid regulatory purposes of the Shipping Act.

On the basis of this finding, the Examiner concluded that respondents' present dual rate system should be permitted "continued use and approval":

> . . . the Commission's decision of January 7, 1969, should be modified . . ., and the order served therewith

should be vacated and these proceedings should be terminated.

The Examiner's findings and conclusions were based upon the testimony of "eleven representative witnesses consisting of shippers, carriers, freight forwarders and conference officials".[2] The Examiner quotes exhaustively from the testimony of these witnesses and reaches the following "General Conclusions":

1.

A representative cross-section of shippers and receivers and freight forwarders, who are intimately connected with the details of shipping arrangements, have experienced an improvement in the service offered by the conference members since the implementation of the present contract system;

2.

The present contract system acts as an incentive to the conference member lines to increase their investments in vessels committed to the conference trade and that the present improved level of conference service is a primary result of the present contract system;

3.

The rule proposed by the Federal Maritime Commission will result in a deterioration of service in the area served by Respondents and presents a threat to the transportation needs of the shipping public;

4.

Rate stability, which is desired by and essential to shippers and receivers, is dependent to a very large degree upon the maintenance of the present contract system;

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2. The 11 witnesses who appeared at the hearing may be broken down by category as follows: five shipper witnesses, three carrier witnesses, two conference witnesses, and one freight forwarder association witness.

5.

For sound business reasons, the testimony discloses that shippers and forwarders alike desire the type of flexibility provided by the present two-contract system and that the "flexibility" proposed by Hearing Counsel may well result in disorganization and trade disruption;

6.

Shippers and receivers receive fair treatment under the present system and can see no advantage in tampering with, or changing their contract arrangements when they are assured that these arrangements work to their advantage, as at present. Actually the record discloses and I so find and conclude that the two-contract system now in use by the Conference is required by a serious transportation need in the area involved herein, is necessary to secure important public benefits, and is in the furtherance of a valid regulatory purpose of the Shipping Act.

Hearing Counsel excepts, in principle at least, to all of the Examiner's general conclusions. Specifically, he objects to the Examiner's basic conclusions that the present contract rate system has (1) resulted in improved service in the conference trade; (2) provided an incentive to member lines to increase their investments in vessels committed to the conference trade; and (3) resulted in rate stability in the various trade areas.

THE CONTRACT SYSTEM AND IMPROVED SERVICE

In concluding that the present improved level of service is a result of the present contract system, the Examiner relied principally upon the testimony of four witnesses: Mr. John W. Flook, Manager of the Trading Department of Macondray & Co.; Mr. Edward H. Shustack, President of R. H. Baker & Co., Inc.; Mr. Albert A. Wright, Assistant Manager of Traffic & Distribution Department, Standard

Oil Company of California; and Mr. James R. Scott, Manager of Transportation Services of the United States Borax and Chemical Corp. of Los Angeles. In each instance the Examiner has quoted, paraphrased or referred to only those portions of testimony which are most favorable to the conclusion he reached. The testimony of Mr. Flook offers an example. The Examiner cited the following in support of his conclusion that the improved service level was due to the present contract rate system:

Q. Mr. Flook, you have been a party to, signatory to the dual rate contract since 1961?

A. Yes.

Q. And you indicate in your written testimony that it has been your experience that the rate agreement covering the three southbound and two northbound has resulted in improved service; is that correct?

A. Yes.

Q. On the part of the Conference?

A. Yes.

Q. What are you comparing that to?

A. Well, we are comparing that to the previous system where there were 10 individual rate agreements.

Q. So since the Federal Maritime Commission's approval of the super conferences, we might call it, you have gotten better service?

A. We have, yes.

Q. In your opinion, is this attributable to the amalgamation of separate conferences into one?

A. Yes, it is an ability by the Conference, I feel, to better structure rates.

Q. I don't understand that.

A. Well, with the Conference controlling the five different trade areas, three southbound and two northbound, we feel that it offers the lines a greater opportunity through the participation of the European lines that do service the area, to offer better service both north and southbound.

Q. When you say better service, can you be a little bit more specific there?

A. Well, as you perhaps know, there are several European lines which are carrying cargo from Europe to the Pacific Coast and they stop in on the way to Central America.

Q. And those European lines are members of the Conference?

A. Yes, and they bring cargo up to the United States, so we have the additional sailings which offer us more flexibility in bringing us cocoa beans at the time we need it, up to the United States.

Q. And prior to the approval of the super conference, the European lines were precluded from stopping into those Central American areas?

A. They were not precluded that I recall, but they did not offer it on a scheduled basis.

Immediately following the portion quoted by the Examiner, we find the following colloquy:

Q. More specifically, how has the imposition of the dual rate agreement increased the service to you? The dual rate agreement is completely apart from the approval of the Conference rate?

A. No, no. The dual rate agreement, in my opinion, offers to the line the opportunity to be assured of sufficient patronage which would justify the scheduling of vessels at regular intervals, and the receivers benefit through this scheduling.

Q. Has service increased from the time when the dual rate agreement was initially imposed on all areas?

A. It would be very difficult to answer that question because the service is dictated by the amount of cargo offerings. It may have decreased in the number of sailings both to the United States and from the United States on the Pacific Coast, but that might be due to the overall reduction in the volume of cargo moving and not attributable to the difference in the Conference structure today on what it was previously.

Q. Has there, in fact, been a diminution of service?
A. Not within the last two or three years I would say. Previous to that, I think, there were more sailings, yes.
Q. And what has accounted for the diminution of service?
A. As I said before, I think it is due to the lesser volume of cargo moving into these areas. I think there has been a greater industrialization in Latin America, and as a result it has affected some of the movement from the Pacific Coast of manufactured items.

From the foregoing, it is just as easily concluded that the establishment and approval of the "super conference" was the cause of the increased service level such as it may be. The real difficulty lies in concluding that it was the present contract rate system that produced the alleged result. Indeed, it would seem that it was the conference agreement that enabled the European lines to participate more fully. The same is true of the other testimony relied upon by the Examiner in concluding that improved service was the result of the contract rate system.

THE CONTRACT SYSTEM AND RATE STABILITY

In our earlier Report in this case we had the following to say concerning the respondents' contract system:

> The contract system as such does not prevent discrimination in rates. The contract system is a tying device; it does nothing more nor less than obligate a shipper in exchange for a lower rate to the exclusive use of conference vessels. We find no persuasive evidence in the testimony of record which demonstrates that there would be any more or less *stability* under a one-contract-one-trade system than there is under the present single contract system. [Emphasis ours] 12 F.M.C. at page 157.

Again, the testimony relied upon by the Examiner fails to demonstrate how the single contract system provides

rate stability which would not otherwise prevail under the system which would offer a separate contract for each of the five trade areas. The following treatment of one witness' testimony is illustrative:

> Witness John W. Flook testified that the present contract system "is important to maintain stability of rates" and that "the imposition of the Commission's proposed rule would probably result in instability of rates and service in the trade areas served by the Conference due to the possibility of disruptive non-Conference service. . . ." Mr. Flook, upon cross-examination, said that as an exporter, his company often sold goods for delivery forward, for up to 60 days in advance. He further stated:
>
> > We require, when making these contracts to be assured that at the time of shipment the rate on which we based our cost calculation would apply.
> >
> > If, on the other hand, there were non-Conference lines within the trade area and there was a freight war in existence where the Conference and the non-Conference lines were competing for the cargo, the natural instability would exist.

In response to an inquiry from the Presiding Examiner, Mr. Flook stated:

> I think that as far as the imports are concerned, I think the general consumer will always benefit by the, again, stability of rates and not having to pay an increased rate on one occasion and a lower rate on another occasion.
>
> * * * * * * *
>
> I relate that to the item that we are importing in greatest volume, cocoa beans, that due to the fixed rate that we have had in effect, the buyers can anticipate their costs on a better basis.
>
> As a matter of fact, in that way the consumer benefits by not having a fluctuating rate.

Or as another example the Examiner offers:

> Mr. M. J. McCarthy, of the Freight Forwarders Association, stated that he had been in the shipping business for 41 years, and that this present contract system "better affords stability of rates", and that without the present contract system there would be no rate stability. When Hearing Counsel asked whether the shipper should have the option of shipping conference or non-Conference, Mr. McCarthy stated:
>
> > If you put it that way, Mr. Tell, forget about the Conference, just break them up and forget about it if you're going to give the latitude where he can ship conference or non-Conference. If he has that latitude, I see no reason why he should have a Conference. Why don't you walk right into a rate war?

Here, as with almost the entire approach of the Examiner and the respondents to the issue at hand, it was made to appear that the choice involved is between the present contract or no contract at all, which is, of course, not the case. We do not insist that a shipper be allowed the choice of conference or nonconference within a "trade area", we only insist that a shipper be allowed to choose whether or not to sign a contract for each of the five trade areas. Nothing in the record supports the conclusion that rate stability is dependent upon the present contract system.

THE CONTRACT RATE SYSTEM AND INVESTMENT INCENTIVE

According to the Examiner:

> Mr. Robert B. Swenson of Balfour Guthrie & Co., Ltd. stated that the present contract system acted as an inducement to Grancolombiana, for whom his company acts as agent, to increase their service and investment in the trade and to maintain their present investment. He stated:
>
> > Well, we only recently, I should say the last three months of 1968, completed a study; we as agents

completed a study for Grancolombiana on the future of the particular trade route and based on this, they are presently studying this and have told us indirectly that they are planning to add to their fleet and improve their service to some extent.

Now, of course, this study and their planning is based upon the fact that there will be certain tonnages moving, and if you take away the larger parcels, of course, the service could not exist, and instead of having a ship every two weeks, there will be maybe a ship a month, or a ship every six weeks.

Thus, in Mr. Swenson's opinion, it would appear that the plans of Grancolombiana to extend their service are directly related to the maintenance of the present contract system, and specifically, the maintenance of the present level of service is dependent upon the conference lines carrying certain base parcels cargo which he felt would be taken away if the Commission's rule went into effect. In light of Mr. Swenson's additional statement that the Grancolombiana Line covers all three of the so-called southbound "trade areas" with the same ship the importance of one contract covering all three trade areas and of Grancolombiana's ability to depend upon patronage for the entire conference area becomes of considerable importance.

In light of such testimony it is apparent that the possibilities of the conference carriers for maintaining and extending service and for their adding to their fleets are directly related to the carrier's assurance that the cargo upon which they are dependent in the Latin American trade area will not be taken away.

I therefore find and conclude from the testimony that the present level of conference service is a result of the present contract system now in use.

The record shows that Mr. Swenson's complete testimony does not demonstrate that Grancolombiana's plans are dependent upon the continuation of the present contract

system. Rather, they are tied to the continuing carriage of certain "base parcels cargo". Here, we would agree with Hearing Counsel that even without the single contract system if a nonconference carrier wishes to carry base cargoes, he would (1) have to offer a lower rate and (2) convince the base cargo shipper that regular and dependable nonconference service will be provided. If the Conference service in the particular trade area is dependable and efficient and the rates are reasonable, it follows that the shippers of any size in that area will sign contracts and the Conference will be adequately protected in that trade area.

THE EFFECT OF THE PROPOSED CONTRACT SYSTEM

The Examiner concluded that "the rule proposed by the Federal Maritime Commission, which would require the respondent conference to offer its contract separately in its five ratemaking areas, would prove detrimental to the commerce of the United States and would adversely affect the public interest."

Here, the Examiner relies most heavily on the testimony of Mr. Henri P. Blok, now Chairman of the respondent conference. Mr. Blok emphasized two factors which the Examiner found to be unique to the respondent conference. First, this conference serves a trade area "situated in one of the most active cross-trade routes in the world." Second, "eleven members of the Pacific Coast/European Conference and several trans-pacific carriers are members of this conference, but their membership in the respondent conference is somewhat incidental to the major trade routes they serve." The Examiner then had the following to say concerning the Blok testimony:

> As a result of the first of these factors, he stated that his conference is peculiarly susceptible to "raiding" by

non-conference members on an occasional basis in the cross trade areas; that if such raiding should occur, it would be an easy step for those carriers who are also members of other conferences to withdraw from their regularly scheduled sailings of the respondent conference because of the second factor; and that resulting chaos and loss of service throughout the conference would occur.

The testimony of Mr. Blok is to be contrasted with that of Mr. Raymond Burley, Mr. Blok's predecessor in the chairmanship of the respondent conference, and a man whom the Examiner recognized as "a distinguished shipping authority" of more than 20 years experience. In responding to an inquiry regarding the effect of the super conference on nonconference competition, Mr. Burley testified in 1967, "The effect it had on nonconference competition has not been material because we did not have a great deal of nonconference competition at the beginning."

The testimony of Mr. Blok primarily relied upon by the Examiner was:

> It is not difficult to recognize . . . that [the] nonmember European carriers, whose vessels in the exercise of their primary trade route functions also regularly traverse various Latin America trade routes, remain an ever-present potential to lift an occasional parcel in the Latin American trade whenever they find cargo offerings on their major trade routes uncomfortably disappointing. In doing so, these carriers may be less concerned about any particular return they receive, as long as this return at least covers the out-of-pocket costs of handling and contributes something towards the cost of overhead, which could well be preferable to having to return their vessel partly unfilled.
>
> . . . under the present conference contract system whereby shippers in general have more at stake than losing their privileges to individual, limited destina-

> tions, the danger is small that regularly engaged Latin American Conference carriers will have to face non-Conference liftings at rates they, or any one who could try to make a living in that trade, could possibly afford. If the present contract system were broken down under the Commission's proposed rule, however, I fear that a good many shippers, who regularly ship to a given area, would easily be swayed to rely on the availability of dead space in non-member European vessels. They would thus cancel their contract to that area, but retain their contracts to other areas in the expectation that the Conference service there would be maintained. This may appear attractive to the shipping public at first glance, but the almost inescapable consequence is that many of the Latin America Conference member lines will rapidly lost interest in this cross-trade which heretofore assured them of cargo offerings to all areas at remunerative rates. After all, it is an assured, paying, rate level which induces the carriers to allocate a portion of their vessels' space to the Latin America trade, sometimes even at the expense of cargo-offerings in their primary (Europe) trade. Necessarily, the end result of the Commission's rule must be a spotty, cut-rate, unreliable service which is neither responsive or adequate to the demands to the shipping public.

The validity of this argument depends, of course, upon the real and effective presence of competition from nonconference carriers, the mere presence of such carriers in the trade is not enough. They must offer a service which is truly competitive with that offered by the respondents. To be truly competitive such a service must, in the view of the respondents' own shipper witnesses, be adequate and dependable and offer reasonable and stable rates. Moreover, in a statement not referred to by the Examiner, Mr. Blok places the extent and severity of the nonconference compe-

tition in its proper perspective. Mr. Blok, after alluding to the 11 members of the Pacific Coast European Conference, who are members of the respondent conference, states:

> At the present time, in the same Pacific Coast/European trade there are nine other carriers not members of this conference, which are exclusively engaged in that major trade route. If it ever appeared that the present members of the Latin American Conference were unable to cope with the tonnage moving in the Pacific Coast, Mexico, Central America, Canal, Caribbean trade, any of these nonmember European carriers may be interested in joining the Latin American Conference which, after all, is open to all qualified carriers. As it presently stands, however, the present Latin American membership appears to fill the bill and is encouraged to stand by its commitments primarily because of the stable conditions which prevail under the present contract system.

It is only after this statement that Mr. Blok points out that:

> It is not difficult to recognize, however, that these nonmember European carriers . . . remain an ever-present potential to lift an occasional parcel of cargo . . . whenever they find the cargo offerings on their major trade route uncomfortably disappointing.

Thus, the nonconference competition which respondents cry would wreak havoc and chaos in the trade if we were to modify their present contract system as proposed reduces itself to some nine lines which might be "interested in joining" the respondent conference if it appeared that respondents were "unable to cope with the tonnage moving" but which also remain ever ready to "lift an occasional parcel" when the offerings in their own trade become disappointing.

Finally, again unmentioned in the Initial Decision, the following colloquy between Mr. A. Wright, Assistant Man-

ager of Traffic and Distribution Department, Standard Oil of California and Hearing Counsel is illuminating:

Q. Mr. Wright, you indicated that you export to all three trade areas in question?

A. Yes, sir.

Q. Do you have any idea as far as the percentage breakdown goes where your exports go?

A. No, sir, Mr. Tell. We have 13 subsidiaries that are signatories to the involved contract here, and I simply have not had an opportunity to refine the figures to get a percentage breakdown from one area to another.

Q. Well, is there a particular trade area in your estimation which occupies a greater percentage of your exports than, say, another?

A. I would suspect that the areas in Central America and Venezuela, for example, loom large in the picture.

Q. What products do they export?

A. Petroleum products basically.

At the time, at the same time, we also have a fairly steady movement of inbound maintenance materials for our installations down there. It could be machinery, pipes, valves, things of that nature.

Q. So, in other words, you are party to both the shipper's agreement and receiver's agreement; is that correct?

A. No, sir. We do not appear as signatory to the northbound agreements.

Q. Why is that?

A. We have very little movement coming north.

Q. When you come north, do you ship Conference?

A. We ship on the Conference lines, yes.

Q. Why, in your estimation, is there no necessity to become part of the receiver's agreement if you utilize Conference service coming north?

A. The need is so minute that it simply is not worth the necessary policing activity of maintaining the Conference agreements and maintaining the records and so forth; it just isn't worth it to us.

Q. Do you utilize anything else but Conference service coming north?

A. Not to my knowledge.

Q. In your estimation, would it not be advantageous to be a party of the receiver's agreement coming north even though your shipments are negligible just by the fact you get a 15 percent reduction?

A. It could be; and if the movement were ever to escalate, it would be; I suspect that we would.

Contrast this statement of Mr. Wright's with our own conclusion as to one of the primary difficulties we found with present contract rate system. In our earlier Report we said:

> Whereas before approval of Agreement 8660 a shipper could have signed a dual rate contract with one, several, or all of ten conferences . . . now a shipper must obligate himself in all three outbound trades and a receiver in both inbound trades. Thus, a shipper who ships the vast majority of his goods in, say, Trade Area "A" and only rarely has shipments in Trade Area "B" must nevertheless commit rare shipments in "B" to conference vessels in order to obtain the lower contract rate in "A".

Nothing in this record causes us to change our mind. We have been offered nothing in the way of transportation need, important public benefits to be secured or valid regulatory purpose to be achieved by the present system. Here, as in the earlier hearing, the vast bulk of the testimony is either speculative as to the consequences of modifying the present system or leads to the conclusion that factors other than the contract rate system—such as the approval of the so-called super conference itself—have been the causes of the rate stability, dependable service, etc. pointed to by respondents as supporting the continued use of the present system.

We have very carefully reviewed the record before us and we find nothing that would lead us to change the conclusions reached in our earlier Report, which conclusions we set forth below omitting quotation marks for the sake of convenience.

In choosing an organizational structure for their amalgamated conference, the Respondents decided to divide it into five trade areas and to restrict participation in matters relating to those trade areas to those member lines actively engaged in them. Presumably, these trade areas are based upon some geographic and operational logic. Thus, within the Conference Respondents have insured the autonomy of the groups of lines operating in a given trade area. Should another line wish to have a say in matters concerning that area, he must institute a service in it. Rates are geared to the operational circumstances and, presumably, to the needs of the shippers in a given trade. It is only when it seeks to obtain a shipper's exclusive patronage that the Conference adopts an all or nothing approach. Whereas before the approval of Agreement 8660 a shipper could have signed a dual rate contract with one, several, or all of ten conferences (assuming they would all have obtained approval of contracts under 14b), now a shipper must obligate himself in all three outbound trades and a receiver in both inbound trades. Thus, a shipper who ships the vast majority of his goods in, say, Trade Area "A" and only rarely has shipments in Trade Area "B" must nevertheless commit those rare shipments in "B" to conference vessels in order to obtain the lower contract rate in "A". But what are the legitimate commercial objectives achieved by the present contract system, which objectives fairly detract from the weight of the loss of freedom of choice by the shipper? What transportation need is served by the present system? What important public benefits are secured by it? Is the present

system imposed in furtherance of some valid regulatory purpose of the Shipping Act?

It has been suggested that the present contract system affords increased stability of rates. But the evidence of record much more readily supports the inference that such stability as exists is due to the concerted rate-making activity under the conference agreement rather than the contract system. Indeed, the record establishes no real connection between the present contract system and rate stability or the prevention of rate wars.[3]

It has also been suggested that the single contract system has provided increased service to conference shippers. But here again the testimony of record convinces us that any increase in service has resulted from the new trading scope of the Conference under Agreement 8660, not from the operation of the present contract system.

A good deal of time and testimony was devoted to demonstrating that the present system has not permitted the member lines of the Conference to increase rates through monopolistic strength. This simply is not relevant to the question at hand. To the extent that it shows anything, such testimony simply shows that even with a single contract system the Conference falls somewhere short of a complete

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3. Rate wars are almost exclusively due to the rate-cutting practices of nonconference lines, yet the record is devoid of any meaningful references to nonconference competition. Indeed, the stability alluded to in the testimony is really the absence of discrimination among shippers, apparently as would have been practiced by the member lines themselves. See testimony of Gottshall quoted at 12 F.M.C., at page 156. But such discrimination is prevented by the fact that once the rates are fixed by the members in concert they are required to be published and filed with the Commission under section 18(b) of the Shipping Act, and the members are then obligated to charge only those rates. Whether there be a single contract system or a system which embodies the one-trade-one-contract requirement is simply irrelevant to such "stability" of rates.

monopoly. It does not go to any legitimate commercial objective of the system.

Absent the protection of section 14b, the exclusive patronage tying arrangement embodied in a dual rate contract would clearly run counter to the antitrust laws. It is therefore contrary to the public interest unless necessary to pursue some legitimate commercial objective. In the normal run of things, that legitimate commercial objective will be a conference's need to protect itself from the inroads of nonconference competition. Here Respondents have been granted permission to use a dual rate system. We will continue that permission. The only change we will require is that the contract be offered separately in each of the five trade areas, and insofar as the record shows such a contract system will still afford sufficient protection against nonconference competition. We remain unconvinced, for the reason set forth above that the present so-called single-contract system is required by some serious transportation need, necessary to secure important public benefits or in furtherance of any valid regulatory purpose of the Shipping Act. Accordingly, we will not sanction the present system's unwarranted inroads upon the nation's antitrust policies. An appropriate order will be issued.

Commissioner James V. Day, Dissenting:

This case concerns the validity of the dual rate system now used by the Latin America/Pacific Coast Conference.

The Conference covers five trade areas—three outbound from the U.S. and two inbound. The dual rate contract employed by the Conference binds a shipper in any one outbound trade area to the exclusive use of conference vessels in that area and the two other outbound trade areas if and when he ships in such other areas. Conversely, a shipper

(receiver) in either one of the inbound trade areas must exclusively use conference vessels in both inbound trade areas.

The basic issue in this case is whether such a dual rate contract is against the public interest as this term is used in Section 14b of the Shipping Act.

The majority has again found that the subject dual rate contract is against the public interest.[1]

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1. The majority likewise found in a prior opinion wherein it stated that the contract, restricting shipper choice of carriers, violated the antitrust laws and was hence against the public interest absent the Conference showing the necessity for such restriction. (Agreement 8660-12 FMC 149 (1969).)

The Conference then objected and petitioned as follows: "Come now Respondents, the Latin America/Pacific Coast Steamship Conference and its member lines, and respectfully petition the Commission to reopen the subject docket for further evidentiary hearings in light of the Commission's report served on January 7, 1969.

"The basis for this petition and motion is that the Commission has, in its report, unfairly and improperly applied the rule of *F.M.C. v. Svenska Amerika Linien*, 390 U.S. 238 (1968), to the Respondents for the reason that Respondents have not been afforded an opportunity to meet the new burden of proof imposed by that rule. The decision in *Svenska* was not handed down by the Supreme Court until March 6, 1968, some six months after the close of the evidentiary hearings in this docket. Nonetheless, on the basis of the *Svenska* decision the Commission has held in its report that, 'It is up to Respondents to show that the two-contract system is required by a serious transportation need, necessary to secure important public benefits or in the furtherance of some valid regulatory purpose of the Shipping Act.'

"Respondents propose to demonstrate through the introduction of competent testimony that the two-contract system presently being utilized by the Conference is required by a serious transportation need, is necessary to secure important public benefits and is therefore in furtherance of valid regulatory purposes of the Shipping Act. Such testimony was not proffered during the prior hearings because of Respondents' belief (wholly reasonable, we submit, in the pre-*Svenska* context) that, before their present contract system could be disapproved the Commission had the burden of making affirmative findings, within the meaning of the Shipping Act, that the present system was detrimental to the commerce of the United States and contrary to the public interest."

Respondents were granted further hearing and the matter is now decided. (In this opinion, underlines have been added for emphasis.)

The majority in this instance has reached the opinion that the contract is invalid via the following legal rationale or route.[2]

The majority decision states: (1) that the subject dual rate contract violates the antitrust laws (in that it restricts shippers from going nonconference).[3]

The majority says: (2) that the subject contract restriction violating the antitrust laws is in itself (sufficient and) substantial evidence that the contract is against the public interest.[4]

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2. It has followed the test hereinafter spelled out at length which was affirmed by the Supreme Court, in ***FMC v. Svenska Amerika Linien,*** 390 U.S. 238, 244-6 (1968) for interpreting Section 15 of the Act. It has done this, as it has said, in agreement that "the statutory phrase 'contrary to the public interest' as it appears in section 14b has the same meaning as it does in section 15". (See Majority Opinion of January 1969; 12 FMC 149, 153.)

3. The majority says (at page 17) that "absent the protection of section 14b, the exclusive patronage tying arrangement embodied in a dual rate contract would clearly run counter to the anti-trust laws".

4. In its prior opinion (12 FMC 155) the majority emphasized that an exclusive patronage tying arrangement violates the antitrust laws and "Therefore, unless there are to be diametrically opposed meanings attached to the public interest standards as they appear in sections 14b and 15, there is without more, *'substantial [and sufficient] evidence'* that Respondents' contract is *contrary to the public interest.*" (Footnote omitted)

This position, of course, is consonant with the Court's in *Svenska* which held (as to § 15) that "once an antitrust violation is established, this alone will normally constitute *substantial evidence that the agreement is contrary to the public interest".*

However, compare some of the legislative history of section 14b. The Senate Committee said "We believe that any contract which contains the eight safeguards expressly required by the amended bill makes out a *prima facie case that the contract is not—contrary to our public interest—.*" S. Rep. No. 860, 87th Cong., Ist Sess. 23 (1961).

The subject contract, of course, contains such special § 14b safeguard provisions and under the Senate rationale it could have been approved by the Commission without further evidence. The majority holds otherwise.

The majority holds: (3) that without countervailing evidence showing the necessity for this dual rate contract, the contract being inherently against the public interest must be declared invalid.[5] In this regard the test employed by the majority for such supportive evidence is that it show that the contract is required by some *legitimate commercial objective*—i.e., required by a serious transportation need, necessary to secure important public benefits or [required] in furtherance of some valid regulatory purpose of the Shipping Act.[6]

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5. This is the Court's position relative to § 15, namely that "once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest' unless *other evidence* in the record fairly detracts from the weight of this factor". *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 244-6 (1968).

This is now the Commission's position relative to § 14b. One should compare, however, this present position to the Commission's statement in *The Dual Rate Cases*, 8 FMC 16, 50 (1964), where in discussing the subject dual rate contract it said: "One intervener in Docket No. 1092 argues that there is no 'need' for the extension of the dual rate system to areas included in the new conference agreement which are not now covered by existing dual rate systems of the individual conferences. *Section 14b does not require that the conference demonstrate a positive need for the* system as a prerequisite for approval. Rather it authorizes the use of dual rate contracts if they meet certain safeguards." This statement confirms a prior opinion of the Examiner (Initial Decision, January 1964, at page 31).

However, regardless of whether the contract initially be considered as either *prima facie in the public interest* (and hence not requiring a demonstration of its need) or *inherently against the public interest* (and thus requiring justification), supportive evidence has been introduced which insures the contract's validity.

6. One ponders the completeness of the majority's general statement that "In the normal run of things, that *legitimate commercial objective* will be a conference's need to protect itself from the inroads of *nonconference competition.*" (*supra*, p. 18).

The legislative history of our law reveals that section 14b was enacted "so as to expressly authorize the use of dual rate systems by conferences, *irrespective of the presence or absence of nonconference competition.*" H.R. Rep. No. 498, 87th Cong. 1st Sess. 7 (1961)

The majority also imply that the subject contract must absolutely be required in order to achieve a valid commercial objective and any degree of restraint in the contract not necessary to achieve that legitimate objective will be struck down as not in the public interest.[7]

Further, the Senate Committee considering this legislation found: "1. *Conferences need the right to use dual-rate contracts*—In order *for* the ocean common carriers and conferences *serving* our foreign commerce to do so *on a regular, dependable, and nondiscriminatory basis*, they must be allowed, as they are throughout the rest of the maritime world, to enter into dual-rate contracts with shippers and consignees. Otherwise, the economics of ocean shipping will force the lines concerned into *rate wars among themselves* that might result in the destruction of ocean common carriage. If that happens, there can be no doubt that the high cost American lines will be the hardest hit." S. Rep. No. 860, 87th Cong., 1st Sess. 10 (1961).

Likewise, it has also been noted that Section 14b springs from "an appreciation of the hard fact of international shipping life that—the only method that has proved practical to assure *continuity of service* on a particular route with a degree of *stability of rates*, in view of the very large *investment* required in the establishment of a regular service, is—[the] providing [of] specific inducements to shippers to utilize the services of the particular line or lines regularly serving that route." S. Rep. No. 860, 87th Cong., 1st Sess. 2 (1961).

Shippers are likewise concerned with obtaining *sound service* for their trade objectives. Further, they look to the dual rate system to provide *stability of rates* and for assurances that their transportation *costs are identical* with those of their competitors shipping within the same conference. H.R. Rep. No. 498, 87th Cong., 1st Sess. 13 (1961) and S. Rep. No. 860, 87th Cong., 1st Sess. 5 (1961). In summary, the aim of the law is "the betterment of the American merchant marine and the stability of foreign commerce." H.R. Rep. No. 498, 87th Cong., 1st Sess. 2 (1961).

Thus, all the above considerations, I would say, should also be considered within the scope of "legitimate commercial objectives" —or pertinent to "serious transportation need, important public benefit, or in furtherance of valid regulatory purposes."

7. Thus the majority's statement — "In the normal run of things, that legitimate commercial objective will be a conference's need to protect itself from the inroads of nonconference competition. Here respondents have been granted permission to use a dual rate system. We will continue that permission. The only change we will require is that the contract be offered separately in each of the five trade areas, and insofar as the record shows such a contract system will still afford *sufficient* protection against nonconference competition." (page 18).

Such is the majority rationale. But in applying all these principles I reach a different result than the majority. I weigh the evidence of record and I conclude as has the Examiner that the subject dual rate contract is in the public interest—required by legitimate commercial objective that is, required by a serious transportation need, necessary to secure important public benefits and is in furtherance of valid regulatory purpose.

In the aforesaid regard I more specifically conclude that the present contract rate system is necessary to maintain *the same* current level and degree of (1) improved *service* in the conference trade; (2) real incentive to member lines to increase their *investments* in vessels committed to the conference trade; (3) sound assurance of *rate stability;* and (4) particular competitive *benefits now enjoyed by shippers.*

I further conclude that the majority alternative contract rate system will not be sufficient to accomplish the same results in support of the public interest.

These conclusions are derived from a review of all the accumulated evidence in this record now before us. The particular evidence which I find persuasive is as follows:

(1) Improved service.

The testimony of eight witnesses was cited by the Examiner in support of his conclusion that the present level of improved service is attributable to the present contract system.[8]

For example, Witness Warrick testified (I.D. p. 11) that the present system of one contract covering all southbound areas *reduces "red tape and paper work" and provides dependability:*

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8. Messrs. Flook (shipper), Shustack (shipper), Wright (shipper), Scott (shipper), Warrick (shipper), Rutherford (shipper), Walker (Grace Line), Swenson (Grancolombiana Line).

"We know that we are covered in all of the areas; we don't have to worry about *arranging contracts* with each and every individual carrier or conference. There is a certain amount of *dependability* in that respect by having the one arrangement under which we are operating today."

Mr. Swenson testified (I.D. p. 13) that the present contract system has acted as an *inducement to increase service:*

". . . we as agents completed a study for Grancolombiana [and] . . . they are planning to add to their fleet and *improve their service* to some extent.

"Now, of course, this study and their planning is based upon the fact that there will be *certain tonnages* moving, and *if you take away the larger parcels,* of course, the service could not exist . . ."

As the Examiner notes, it would appear from the above testimony that Grancolombiana's plans to *improve service* are related to *maintenance of the present dual rate contract coverage—securing certain parcels of cargo.*[9]

Witness Shustack stated (I.D. at p. 8) that the present system has encouraged a sufficiency of service, has ensured his ability to compete in South America, and is of benefit to U.S. commerce:

"The service as furnished by the Conference enables a *sufficiency* of vessels and availability of the sufficiency of vessels to make the required shipments over a period of time of these contracts.

". . . with this system not adhered to wherein just chance carriers that come in and scoop up some of the business and run off with it and discourage the regular Conference vessels in making these odd ports, we might not then be able to *compete* in South America.

* * * * * * *

9. The importance of the single contract coverage to Grancolombiana is self-evident when it is noted that *the line covers all three southbound areas* with the same ship according to Mr. Swenson.

Q. "Would you say that the single Conference Contract system serves a beneficial need and is of benefit to the commerce of the United States?"

A. "From my own experience I have found it has met a need and is so."

Witness Scott testified (I.D. at p. 9) that "the single conference *contract covering all the trade areas serviced by the Conference* presents a potential for satisfying important transportation needs in the area . . . which could not be obtained under the Commission's proposed rule."[10]

One may also recall earlier testimony of record by witness Hansbrow (carrier agent) who said (I.D. 1968 at p. 23):

"Q. Once having an advantage of a greater number of shippers who are bound by agreement to ship on Conference vessels, would you say that it is an *incentive* to the line involved, *to extend its service* in order to carry more cargo?

A. I would think very definitely so, yes."

Further, witness Gottshall of Sea-Land earlier stated (I.D. 1968 at p. 24):

"Q. Would you say, then, that the employment by a single Conference of a single contract system was *encouraging to your extension of service* in Latin America?

A. Yes, it was."

In the light of such testimony it is clear that maintenance and extension of service is directly related to the present single contract system. One thus concludes that the present level of improved service is, indeed, a result of the present system.

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10. The witness further stated (I.D. at p. 10) relative to "area" that "we feel that the *Latin American area is generally one area*" and that "we haven't had any problems on getting our shipments out on Conference vessels. We consider *Conference vessels as a whole* rather than [individual lines]."

(2) Real investment incentive.

Witness Swenson testified (I.D. at p. 13) that the present contract system has also acted as an *inducement to Grancolombiana to increase its investment:*

> ". . . we as agents completed a study for Grancolombiana on the future of the particular trade route and based on this, they are presently studying this and have told us indirectly that they are *planning to add to their fleet....*"
>
> "Now, of course, this study and their planning is based upon the fact that there will be *certain tonnages* moving, and if you take away the larger parcels, of course, the service could not exist..."
>
> • • • •
>
> "I am afraid . . . *if we broke up the present contract* structure that we have and allowed a shipper to ship non-Conference to Central America and Conference to South America or the Caribbean area, *this would take away a very substantial portion of their base cargo,* and obviously it would mean that the service would be reduced." (Tr., p. 127)

In view of such testimony one concludes that the present real investment incentive is indeed based on having the certain assurance of shipper business through the present contract coverage.

(3) Sound assurance of rate stability.

The Examiner has cited the testimony of eight witnesses in support of his conclusion that the present sound assurance of rate stability is dependent on the present contract system.[11]

For example, Mr. Blok, the Conference Chairman, stated:

> "These carriers provide this service at agreed, dependable and uniform rates, offering regular sailings in response to the need of the traffic. More importantly,

11. Witnesses Shustack, Warrick, Torres, Scott, MacInerney, Flook, McCarthy and Blok.

these carriers are willing to commit themselves to this incidental trade precisely because they are *assured of a remunerative rate level and of loyalty on the part of the shipping public.*"

I likewise conclude, therefore, that the particular incentive and assurance of rate stability now existent is due to the present wide coverage of the one contract system.

(4) Particular competitive benefits now enjoyed by shippers.

The Examiner relied on the testimony of seven witnesses to reach his conclusion that the present contract operates to the particular benefit of shippers.[12]

For example, the Examiner noted that witness *Shustack* stated he had found the present system gave his company an availability and a sufficiency of vessels which *allowed his company to compete* in areas where they would not otherwise be able to compete.

Witness *McCarthy,* President of the Pacific Coast Customs and Freight Brokers Association, which handles between 50 and 60 percent of the total cargo moving in the Latin American trade, said:

> "The way it [the conference contract system] is working now, he [the shipper] has that *flexibility to quote his export price under one contract* in the three trade areas, which is flexible to the shipper and flexible to me as a forwarder."

Further, in late testimony, Mr. *McCarthy* responded (I.D. at p. 24):

> ". . . I thought I answered it sometime ago by stating that the flexibility as proposed by the Commission as against what the situation is today in my opinion the shipper has *more flexibility* today than he would have under, say, two or three or four contract rate systems.

12. Witnesses Scott, Shustack, Rutherford, Flook, Warrick, McCarthy and Walker.

"I am speaking from experience that I have found in the European Conference and the Westbound Conference trade that flexibility within those trades in my opinion is very, very good for the shipper, and I think the same condition should exist in the trades in the Latin American countries.

"Now, as I told you before, that a shipper by having a contract in the whole area that we're talking about in South America is *in a position to quote prices in any area and thereby no delay* in that shipper getting a contract from the Conference.

"Now, I know that has happened, and when you had the Conference before there was delays. I know that the Conference puts out a contract as quickly as possible but the shipper has to have that flexibility to say I can go here, there and there, and I have one contract."

As a further example of how the present contract system benefits shippers in getting business, and fosters extensions of commerce, one notes the testimony of Mr. *Walker* (I.D. at p. 12):

". . . rates have been arranged by the Conference to Peru and Chile because there is every evidence that this will expand, if successful, to every counrty in Latin America, and this particular shipper has contracts; he is particularly interested in our Conference setup because he has *confidence in it that if he is treated properly and in a business-like way in one area that he can build into the other area and expect the same treatment.*"

I also refer to prior testimony of record by the respondent Conference *Chairman* stating that under the present contract system:

"We are better able to assure the shipping public that their *competitor is getting the same rate,* freight rate, as he is, so they have greater surety in the selling in Latin American markets." *Agreement 8660,* 12 FMC 149, 162 (1969).

Hence, I conclude that such testimony as above noted supports the view that the present contract system provides particular benefits now enjoyed by shippers.

The Adverse Effect of the Majority's System.

The Examiner concluded that the majority's alternative would be detrimental to commerce. He reached this conclusion from the testimony of five witnesses.[13] He noted that the lines stated they would lose their particular incentive to maintain their present level of service and investment and that shippers favoring the present system were fearful that the majority's system would result in a disruption of service for our commerce.

For example, the Examiner noted (I.D. at pp. 14 and 15) the testimony of Conference Chairman Blok who referred to the particular vulnerability of the respondent conference and the impact which the Commission's proposed rule would have on the service which the other witnesses stated they enjoy and wished to maintain. Mr. Blok emphasized that eleven members of the Pacific Coast/European Conference and several trans-Pacific carriers are members of this conference, but their membership in the respondent conference is somewhat incidental to the major trade routes they serve.

As a result of this factor, he stated that he believed it would be an easy step for those carriers who are also members of other conferences to withdraw from their regularly scheduled sailings of the respondent conference and that upon such occurring chaos and loss of service throughout the conference would occur. Mr. Blok described the situation as follows:

> "*If the present contract system were broken down* under the Commission's proposed rule, . . . the almost inescapable consequence is that many of the Latin

13. Witnesses Blok, Walker, Swenson, Flook and Shustack.

America Conference member *lines will rapidly lose interest* in this [trade] which heretofore assured them of cargo offerings to all areas at remunerative rates. *After all, it is an assured, paying rate level which induces the carriers to allocate* a portion of their vessel's space to the Latin America trade, sometimes even at the expense of cargo offerings in their primary (Europe) trade. *Necessarily, the end result of the Commission's rule must be a spotty, cut-rate, unreliable service* which is neither responsive or adequate to the demands to the shipping public."

Prior testimony of record supports the above evidence. Then Conference Chairman Burley said in 1967:

"I testified earlier that one of our real problems in the matter of administering a noncontract rate system and keeping rate stability in our trade was the fact that the Latin states are right in the middle of the cross trades.

"In other words, as this map displays, vessels traversing the area from the Orient to the Atlantic Coast traverse part through Central American through Central America, South America, through the Caribbean.

"They are potential nonconference competition if they so wish.

"We have the Japanese lines that come from Japan via the Pacific Coast to the west and east coasts of South America. *If they weren't Conference members they would be potential competition.*

". . . I think that we have kept it fairly well under control through our single-contract system." (1967 *Tr.*, pp. 26-28)

I would further note the testimony of shipper witness Flook who said (I.D. at p. 17) that if the present contract system were broken up into a number of separate contracts, there would be *no incentive for the present carriers to remain in the trade* and that this "would result for a time

in a freight war and could possibly disrupt the service which we are presently enjoying on a really scheduled basis.[14]

Under all the circumstances above noted, I conclude that switching to the majority's alternative would prove detrimental to our commerce and not in the public interest.

CONCLUSION

To summarize, we here determine the issue of whether the Conference's dual rate contract is against the public interest as this term is used in Section 14b of the Shipping Act.

The majority presumes it is unless the contract is shown to be required by some legitimate commercial objective—i.e., required either by a serious transportation need, or necessary to secure important public benefits or [required] in furtherance of some valid regulatory purpose of the Shipping Act.

I have found that the contract is required in order to maintain the existing: improved carrier service, carrier investment incentive, assurance of rate stability, and competitive benefits to shippers. Each one of these factors is certainly a legitimate commercial objective representing a serious transportation need, an important public benefit or furthering a valid regulatory purpose.[15]

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14. Witness Edward Shustack summed up the attitude of the shipping public:

> "I would be loath to tamper with a system that is working and working real well especially when American manufacturers are at a disadvantage shipping to foreign ports versus their counterparts in other countries.
>
> "I would have to be shown a substantial advantage in such a change before I would want to tamper with what I feel to be an unknown situation."

15. See the legislative history of section 14b noting these factors of service, investment, rate stability, and shipper benefit. Footnote 6 at page 3, *supra*.

I would emphasize that the contract is essential for not merely one but, indeed, for all four factors or objectives. If the contract related to just one, of course, this alone could be support for its continued use.

As a final word on geographic area I would point out that there are a number of other conferences cited in the record which offer approved dual rate contracts covering a geographical area greater than the areas covered by respondent's contract and which thus bind shippers to ship only conference in such greater area (regardless of the routing of their current business). Broadness of coverage cannot *per se* be equated with badness in viewing the history of respondent conference.[16]

Where, of course, the present shipper contract is here found on the evidence to be required, this is sufficient to justify its use regardless of whether the conference structure also contributes to the improved service, carrier investment incentive, assurance of rate stability, or the competitive benefits to shippers flowing from dual rate contract coverage.

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16. This long-used system of one contract for shipments to Latin America (and another for shipments therefrom) is consonant with shipper testimony that "the Latin American area is generally one area" and "We consider Conference vessels as whole rather than [individual lines]." (Footnote 10, *supra.*) In this connection, a significant number, although not all, of the conference carriers operate in several of the five trade areas the conference has designated regarding carrier operations.

In the final analysis it is no more valid to try conforming apples to oranges than to say that the shipper contract coverage must be splintered in accord with the conference's internal organizational structure of five carrier areas. The conference structure merely insures that the particular carriers operating in an area have the say in such area—logically, they are best equipped through their current operations to vote therein on pertinent conference matters. This is hardly necessary or deirable to the shippers' business operations in this case. Certainly the evidence here shows that the present shipper contract coverage is considered to be at least one necessary support for present and potential business and benefit to all.

Indeed, the evidence is certainly "substantial" that this long-existing dual rate contract is required. Testimony was taken from eleven representative witnesses consisting of carriers, conference officials, shippers and freight forwarders. Essentially, all the testimony is in favor of the present dual rate contract (that it is required) and against the majority substitute (not shown to be able to achieve as much for our commerce, our carriers and our shippers). It would seem far less certain in protection of the public interest to ignore sworn testimony of shippers and carrier management as to the benefits merely because such benefits possibly could "be more readily attributed to causes other than the present contract system". This is particularly so where the sworn testimony was (1) open to the testing of cross examination; (2) remains unrebutted; and (3) pertains to actual operating experience over a number of years. I would further emphasize that actual experience must be given proper weight. The factor of actual experience tends to insure the probative value of testimony pointing out the particular benefits attributable to the subject system.

I hereby hold in the light of all the evidence that the existing dual rate contract accomplishes legitimate commercial objectives and is in the public interest. Hence, and subject always to appropriate Commission review, the conference is entitled to continue using its existing dual rate contract.

/s/ FRANCIS C. HURNEY
Francis C. Hurney
Secretary

(SEAL)

Federal Maritime Commission

Docket No. 1092

Served
December 31, 1970
Federal Maritime Commission

AGREEMENT NO. 8660—LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE AND PROPOSED CONTRACT RATE SYSTEM

ORDER

This proceeding was initiated by the Federal Maritime Commission to determine whether the Commission should by rule require the Latin America/Pacific Coast Steamship Conference and its member lines (Respondents) to offer its dual rate contracts in each of the five trade areas covered by the Conference agreement, and the Commission has fully considered the matter and has this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof. The Commission found in said Report, *inter alia,* that the existing Conference dual rate system, requiring signatory shippers to commit their exclusive patronage to the Conference in all three outbound trade areas, and signatory receivers to give their exclusive patronage to the conference in both inbound trade areas, is contrary to the public interest and cannot be permitted approval pursuant to section 14b of the Shipping Act, 1916.

Now, Therefore, It Is Ordered, That Clause 2 of Respondents' dual rate contract be amended to read as follows:

2. *Trades covered by this Agreement:*
This Agreement covers the transportation by water of goods from Pacific Coast ports of the United States and Canada and the ports in Latin America as set

forth in the five trade areas described in this clause. Merchants executing this contract may do so for any or all of the trade areas, as they desire, and notation of the trade areas covered by this contract shall be made at the end thereof: (1) from Pacific Coast Ports of the U.S. and Canada to:

Trade Area "A" ports on the Pacific Coast of Mexico, Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, and Puerto Armuelles, R.P.;

Trade Area "B" Colon and Panama City, R.P., Balboa and Crostobal, C.Z., ports in Barbados, British Guiana, British Honduras, Atlantic Coast of Colombia, Atlantic Coast of Costa Rica, Cuba, Dominican Republic, French Guiana, French West Indies, Atlantic Coast of Guatemala, Haiti, Atlantic Coast of Honduras, Jamaica, Leeward and Windward Islands, Netherlands Antilles, Atlantic Coast of Nicaragua, Atlantic Coast of the Republic of Panama, Surinam, Trinidad and Venezuela;

Trade Area "C" Pacific Coast ports in Colombia, Ecuador, Peru and Chile;

(2) to Pacific Coast ports of the U.S. and Canada from:

Trade Area "D" Pacific Coast ports of Chile and Peru;

Trade Area "E" Caribbean ports of Cuba, Jamaica, Haiti, Dominican Republic, Trinidad, Windward and Leeward Islands, Barbados, French and British Guianas, Surinam, French West Indies, Venezuela, Netherlands Antilles and Colombia, Colon and Panama City, R.P., Balboa and Cristobal, C.Z., ports on the Pacific Coast of Mexico, Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica.

It Is Further Ordered, That, effective 30 days from the date of this order, Respondents' dual rate contracts, amended in accordance with this order, shall be used by Respondents to the exclusion of any other terms and pro-

visions for the purpose of according merchants, shippers, and consignees contract rates.

By the Commission.

/s/ FRANCIS C. HURNEY
Francis C. Hurney
Secretary

(SEAL)

Appendix C

Detailed History of the Proceedings Below

(a) Phase One—1962-1966

The case had its formal beginnings in the middle of 1962, when, following a lengthy series of informal and preliminary consultations with various members of the Federal Maritime Commission and its predecessor Federal Maritime Board, the member lines of ten small freight conferences, serving various segments of the inbound and outbound Pacific Coast/Latin American trades, filed with the agency, for approval under Section 15 of the Shipping Act, an agreement (designated Agreement No. 8660) to amalgamate the ten rate-making groups into a single conference, to be called the Latin America/Pacific Coast Steamship Conference (the petitioner Conference here). Although considerably smaller than a significant number of other conferences then (and still) serving trades to and from the United States, in terms both of cargo carriage and of geographical area,[1] the Commission's Hearing Counsel early dubbed the proposed new Conference "The Superconference"—a label which, if as legally meaningless as it was factually erroneous, has nevertheless persisted in Hearing Counsel presentations throughout the succeeding nine years, and undoubtedly played a significant part in the Commission result reached, now being appealed.

Concurrently with this filing under Section 15, the carriers also submitted for approval a shipper's rate agreement (for use outbound) and a receiver's rate agreement (for use inbound), pursuant to the newly-enacted Public Law 87-346 and the newly-added Section 14b of the Shipping Act. All of the foregoing was set down for hearing

1. See, for example, J.A. 94 (Examiner's 1968 decision, p. 13, n.9), also J.A. 159-160; and see J.A. 21-22 (Examiner's 1964 decision, pp. 21-22).

in the Commission's Docket No. 1092. Extensive evidentiary hearings were held, and in due and orderly course the assigned Hearing Examiner issued his Initial Decision, approving both the new Conference under Section 15, and, with minor modification, the form and the use of the tendered shipper's and receiver's rate agreements, pursuant to Section 14b [J.A. 1-161].

More or less concurrently with the foregoing, the Commission also had before it, filed for approval under the new Section 14b, exclusive patronage contracts in use or proposed for use by virtually every other conference serving a U.S. trade. Eventually all of these cases, including Docket 1092, were lumped into omnibus decision called "*The Dual Rate Cases*," 8 F.M.C. 16 (March 27, 1964), in which the Commission purported to issue its "final decision" in each of the sixty-odd individual Section 14b dockets. The Section 15 (i.e., new-Conference) issue in Docket 1092 followed along in the same decision. 8 F.M.C. at 49-51.

As already noted, in structuring the new Conference the lines had subdivided the outbound trade into three rate-making "areas"[2] and the inbound into two.[3] As the Con-

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2. *Trade Area "A"*—From Pacific Coast ports in the U.S. and Canada to ports on the Pacific Coast of Mexico, Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, and Puerto Armuelles, R.P.

Trade Area "B"—From Pacific Coast ports in the U.S. and Canada to Colon and Panama City, R.P., Balboa, Cristobal, C.Z., ports in Barbados, British Guiana, British Honduras, Atlantic Coast of Colombia and Costa Rica, Cuba, Dominican Republic, French Guiana, French West Indies, Atlantic Coast of Guatemala, Haiti and the Honduras, Jamaica, Leeward and Windward Islands, Netherlands Antilles, Atlantic Coast of Nicaragua and the Republic of Panama, Surinan, Trinidad and Venezuela.

Trade Area "C"—From Pacific Coast ports in the U.S. and Canada to ports in Colombia, Ecuador, Peru and Chile.

3. *Trade Area "D"*—To Pacific Coast ports of the U.S. and Canada from Pacific Coast ports of Chile and Peru.

Trade Area "E"—To Pacific Coast ports in the U.S. and Canada from Caribbean ports of Cuba, Jamaica, Haiti, Dominican Republic, Trinidad, Windward and Leeward Islands, Barbados, French

ference Chairman explained, both in the 1963 hearings and in various proceedings thereafter, the "trade-area" concept was simply a more sophisticated refinement of the conventional rate-group system utilized by many existing conferences. In its *Dual Rate Cases* disposition, however, the Commission seized upon this improved internal rate-making concept and—without benefit of any connective reasoning—equated that to the proposed exclusive patronage contract system. Notwithstanding the record fact of single contract systems in all other—many larger—conferences, and totally without supportive evidence, the Commission, quite out of the blue, announced its determination that the present Conference's two-contract system was "neither necessary nor fair". It thus purported to "find," under Section 15, that "it would be both contrary to the public interest and detrimental to commerce for the conference to require that a merchant obligate himself to exclusive patronage in all[4] of these areas . . ." It thus approved the formation of the new Conference, subject, however, to the condition that it offer—

> "the use of a dual rate contract in each of [the] five trade areas and merchants must be offered the privilege of executing a contract for any or all of the trade areas, as they desire." 8 F.M.C. at 50.

Ironically, elsewhere in the very same *Dual Rate Cases* decision the Commission itself pinpointed the fundamental fallacy and inequity of this "condition." In discussing—and

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and British Guianas, Surinam, French West Indies, Venezuela, Netherlands Antilles and Colombia, Colon and Panama City, R.P., Balboa and Cristobal, C.Z., ports on the Pacific Coast of Mexico, Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica.

4. This mischaracterization of the present system as a "*single*-contract" system pervades the entire eight years of the Commission's preoccupation with the problem, enduring even into its latest order; see J.A. 191-192 (Appendix B to this Petition, pp. 74-75). In fact, the petitioner Conference has always utilized a *two*-contract system; one in and for the outbound trade, and one, the inbound.

approving—the inclusion of Canadian and/or Mexican ports within the scope of many conferences' contract systems, the Commission explained the necessary reason, thus:

> "The purpose of the inclusion of these areas *in a single contract* is to obligate merchants who desire dual rate contracts from or to the United States to also obligate themselves to exclusive patronage from or to ports contiguous to the United States. *This is a natural result of the fact that the conference offers service to all such ports. If merchants were permitted to obtain lower rates by promising their exclusive patronage only from or to United States ports, they could easily use nonconference vessels from or to nearby Canadian or Mexican ports and honor the contract only when it met their convenience. We, therefore, are permitting contracts to include Canada and/or Mexico where these areas are included in the service offered by the conference." The Dual Rate Cases,* 8 F.M.C. at 43 (emphasis added).

Precisely the same geographically-compelled considerations apply here: For example, the West Coasts of Guatemala, Nicaragua, Costa Rica, and Panama are all in trade area "A", while the Atlantic Coast ports of the same four countries are in area "B". Similarly, while the Pacific Coast of Colombia is in area "C", its Atlantic Coast is in "B".[5] For same unexplained reason, however, the eminent logic of the Commission's own position, as to Canada and Mexico, failed to make even discernible impression on the majority —in 1964 or at any time thereafter—in the precisely equivalent situation here.[6]

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5. It should be noted, moreover, that, as the subsequent hearings were to establish beyond doubt, shippers as well as carriers consider the Latin American countries served (in each direction) as *a single trade*. See, e.g., Commissioner Day's 1970 dissent, J.A. 184, n. 10; 189, n. 16 (Appendix B to this Petition, pp. 65, 72).

6. Note however Commissioner Day's 1969 dissent, on precisely this point, 12 F.M.C. at 162, text and n. 16.

This Conference plus two other Pacific-Coast-based shipping conferences took an appeal from *The Dual Rate Cases* to the U.S. Court of Appeals for the Ninth Circuit, challenging in the main the Commission's wholesale rewriting of their Section 14b contractual terms, rather than measuring them, case by case, against the specific statutory provisions of subsections (1) through (8) of that Section. As to the Latin American Conference, a challenge was also made to the factually unsupported five-contract "string" which the Commission had placed upon its Section 15 organizational approval. The Court of Appeals affirmed the Commission, in largest part, on its Section 14b actions, and this Court denied review. *Pacific Coast European Conference v. Federal Maritime Commission,* 350 F.2d 197 (9th Cir. 1965), *cert. denied,* 382 U.S. 958 (1965). In an unreported per curiam decision on rehearing, however, and after full briefing on this focused issue, the Ninth Circuit *set aside* the Commission's factually unsupported "five-contract" precondition.[7]

In the remand proceedings which followed, this Conference quickly accepted all of the Commission's prescribed contractual terms and received the Commission's full approval, both for its Section 15 conference organization

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7. The Commission's brief, in the rehearing phase, put its strongest foot forward on the issue, stating:

> "In imposing the condition which petitioner challenges, the Commission made specific findings in accord with Section 15 and concluded that absent the condition the agreement [No. 8660] would be detrimenal to the commerce of the United States and contrary to the public interest."

Urging the Court's affirmance of this holding, the Commission's brief continued:

> "The Commission's findings (set out at pp. 44-45 of the Commission's Report) [reported in 8 F.M.C. at 49-51] provide an adequate basis for affirmance by this Court of the Commission's condition of approval of the new conference agreement."

The Ninth Circuit, obviously, disagreed.

and for its Section 14b contract system—one contract in each direction—*without strings.* [J.A. 64-65]. In its subsequent 1969 decision herein, the Commission frankly conceded that such approval, unqualified by any "five-contract" requirement, was granted by its order of February 16, 1966. See 1969 Decision; *Agreement No. 8660—Latin American/Pacific Coast Steamship Conference,* 12 F.M.C. 149, 151, n.3.

(b) Phase 2—1966-1969

The Commission was not, however, done with the matter. Having failed to accomplish its pre-conceived, self-generated "modification" as a matter of Section 15 order, nine months later, on November 16, 1966, it announced its intention to impose the same condition by means of "rule" —directed, of course, solely to this one Conference, alone,[8] under ostensible authority of Section 14b [J.A. 66-68].

The Conference protested on several grounds, but, bowing to the apparent inevitable, urged that, at the least, such a "rule", if imposable at all, must be decided on the record, after an evidentiary hearing. [J.A. 69-76]. The Commission acceded to this latter request [J.A. 77-79],[9] and the case was assigned back to the Hearing Examiner, for a further round of testimony [J.A. 80-81]. In the ensuing hearings, held during 1967, the Conference presented the testimony of more than half a dozen conference-office and conference-carrier witnesses, affirming as demonstrated result the

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8. Professor Davis, in conjunction with all scholarly commentators on the Administrative Procedure Act, points out that the reference in Section 2 of the Administrative Procedure Act (now 5 U.S.C. § 551) to "rules . . . of particular applicability" was not intended to change into rule-making that which was and is in actuality adjudication. Davis, Administrative Law Treatise, § 502, pp. 295-296 (West Publishing Co., 1958).

9. In its subsequent decision at the conclusion of this phase (the 1969 Decision), the Commission expressly affirmed its commitment to deciding the matter "on the record." 1969 Decision; 12 F.M.C. at 153; see also 154.

predictions they had made in the pre-approval hearings of 1963, respecting the greatly improved service in the trade which had resulted from approval of Agreement 8660 and the two-contract system. No witnesses appeared, either to protest the Conference's existing two-contract system or to support the Commission's widely-publicized, proffered five-contract "alternative."

On the basis of the evidence before him, the Examiner once more issued a comprehensive Initial Decision supporting the Conference's position [J.A. 82-108]. Ruling (clearly in accordance with the Administrative Procedure Act, 5 U.S.C. §556, as well as with the Commission's own Rules of Practice and Procedure) that the Commission, as the "proponent of the rule or order" (or here, presumably *both*), had the burden of proof and persuasion, he found in the evidence absolutely nothing to support the Commission's five-contract "rule". To the contrary, he found that, though without legal obligation to do so, the Conference had nevertheless produced substantial evidence in strong affirmative support of its present system. [J.A. 85-86, and n.5 therein].

A hiatus of more than six months followed. Meanwhile, before the Examiner's decision was rendered but after the hearings had closed and the briefing to the Examiner had concluded, this Court, reversing the District of Columbia Circuit, announced its *Svenska* decision.

Then on January 7, 1969, the Commission issued its final decision in the reopened Docket 1092 (the 1969 Decision; 12 F.M.C. 149). In it, the majority held that, yes indeed, it had the burden of proof (12 F.M.C. 154, n.8), but that, by virtue of *Svenska*, it had, without more, discharged that burden, by the very existence of the "anti-competitive agreement" itself—that is, by virtue of the very contract rate system under scrutiny, which by then had been in full,

lawful, smoothly-functioning effect for over two years. On the basis of this reasoning, it once again imposed its five-contract requirement.

(c) Phase 3—1969-1972

The Conference again protested, arguing, first, the inapplicability of the *Svenska* decision to the present case at all; but seeking, at the least, opportunity to meet the ostensible new procedural test. [J.A. 110-123].

Again the Commission by-passed the greater protest but acquiesced in the lesser, and once again, on Conference-submitted "offer of proof", ordered the taking of testimony, for the Conference to present its "justification," under *Svenska,* for the continuation of the present, trouble-free system. [J.A. 125-128].

In now the third set of evidentiary hearings in the Docket—the second devoted specifically to this one focused issue—the Conference produced a total of eleven witnesses, representing, in rare unanimity, all segments of the affected trade: the Conference Chairman and former Chairman; representatives of two member lines (who had also testified in the 1967 hearings); and seven witnesses from the shipping public, the users of the Conference's service and supposed "beneficiaries" of the Commission's "proposed rule". These latter included representatives ranging from the large and intermediate-sized shippers and receivers to the small. In an effort to present the views of the many shippers too small to have their own freight departments, and whose only contact with the carriers is thus through a freight-forwarder intermediary, the Conference also produced Mr. M. J. McCarthy, testifying in his capacity as President of the Pacific Coast Customs and Freight Brokers Association; as Mr. McCarthy testified, the freight forwarders, represented by

his Association, handle between 50 and 60 per cent of the cargo movements in the concerned trade.[10]

The Conference-office and carrier-member witnesses all testified as to various public-interest benefits which they felt the present system was fostering, their felt need for that system, and the predictable ills which they could foresee should the Commission's substitute be adopted instead. The shipper/receiver/forwarder witnesses all testified that, on the one hand, they supported the Conference's present arrangement, felt it served their various needs, and saw no reason to change it; on the other hand, could see no advantage (and, in the majority of cases, could foresee *considerable dis*advantage) in the Commission's substitute, and did not wish to see it put into effect. One shipper witness put it more bluntly. Pressed by Commission counsel as to his rejection of the Commission's "proposed rule", and encouraged to hypothesize "benefits" which might possibly transpire from the appearance of a non-conference rate-cutter, the witness finally retorted:

> "I can only think we might get killed in the interim, finding that out. You may be right, and we would be dead if you are wrong." [Examiner's 1969 Decision, p. 18; J.A. 146]

No witness or party (other than, again, Commission staff counsel) appeared in support of the Commission's "rule." Again the Examiner affirmed the Conference position, in an

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10. For a reasoned discussion of the ocean forwarder's role to his shipper clients, see *Freight Forwarder Investigation*, 6 F.M.B. 327, 333-335 (1961); see also *Practices and Agreements of Common Carriers*, 7 F.M.C. 51, 59 (1962).

The Commission's and appellate court's disparaging remarks respecting Mr. McCarthy's alleged "lack of understanding" of the case result from the quotation of one exasperated remark quite out of context. In fact, the full transcript shows Mr. McCarthy to have been extremely well-informed and responsive to the focused issue at hand.

exhaustive Initial Decision [J.A. 129-156]. And again—after virtually another whole year's hiatus after submission of the case to it—the Commission, by a 3:1 vote, reversed, and once again ordered its "five-contract rule" into effect [J.A. 161-190, 191-192 (Appendix B to this Petition)].

The Commission Report opens with a lengthy reference to the agency's original action, in first imposing the "five-contract" requirement in *The Dual Rate Cases,* in 1964. This is apparently meant to serve as some basis for perpetuating that condition now. The Report neglects to point out, however, the Ninth Circuit's reversal of that 1964 ruling, and, similarly, the agency's own *unqualified* approval of the present system, on remand from that Court.

The heart of the 1970 Decision, repeated several times in the course of the Report, is that the Commission was "not convinced" that the beneficial results of the Conference's present operations and service to the trade, widely testified to in the evidentiary hearing, were *"necessarily"* the result of the present contract system, of one contract, trade-wide, southbound, and one contract, trade-wide, northbound. So opining, the agency rested its order flatly on the proposition that it—

> "[would] not sanction the present system's unwarranted inroads upon the nation's anti-trust policies." [J.A. 178; Appendix B to this Petition, p. 58].

An appeal was taken to the U.S. Court of Appeals for the District of Columbia Circuit, as the appellate court considered most appropriate, because of its own prior involvement in the *Svenska* proceedings, to evaluate the Supreme Court's opinion and the sweeping application made of it here. Apparently subdued, however, by its reversal in that earlier case, the Circuit Court refused to distinguish or

delimit the *Svenska* precedent and, although by its "candid admission" "not without difficulty," found basis to affirm. (Appendix A to this Petition).

Meanwhile, the Commission's order has been stayed, by the Commission [see J.A. 202], pending the outcome of the judicial review.

Appendix D

STATUTORY PROVISIONS INVOLVED

Section 14b of the Shipping Act

Notwithstanding any other provisions of this chapter, on application the Federal Maritime Commission (hereinafter "Commission"), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests

himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discrimina-

tory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided, however,* That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term "contract shipper" means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section.
46 U.S.C. § 813a (1970).

Section 15 of the Shipping Act

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic;

allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate polic-

ing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action. *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or

other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

46 U.S.C. § 814 (1970).

Section 7 of the Administrative Procedure Act

Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) . . . .

(c) . . . .

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to con-

duct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U.S.C. § 556 (1966).